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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

No. 119

ADVANCE TRANSPORTATION COMPANY, a corporation,

Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941

No.....

ADVANCE TRANSPORTATION COMPANY, a corporation, Petitioner, vs. ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER, Respondents.	On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Petition for Writ of Certiorari

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Now comes your petitioner, Advance Transportation Company, a corporation, defendant-appellant below, and respectfully prays for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review the decision of said court rendered in the case of Arthur F. Miller, Thomas G. Foster, Richard J. Browne, Edward J. Shoffner and Albert F. Wagner versus Advance Transportation Company, a corporation, being Case No. 7744 in said Court.

Statement of the Matter Involved.

The respondents seek to recover damages for personal injuries sustained when an automobile in which they were riding ran into and collided with the rear

end of a trailer and tractor owned and operated by your petitioner, which the respondents allege was negligently stopped and parked on a paved portion of the highway. There were originally three suits started in the state courts, one by the respondents, Richard J. Browne, Albert F. Wagner and Edward J. Shoffner (Tr. 2), another by the respondent, Arthur F. Miller (Tr. 23), and the third by the respondent, Thomas G. Foster (Tr. 41). On petitions of your petitioner the causes were removed to the District Court of the United States for the Northern District of Illinois, Eastern Division, where the cases were consolidated (Tr. 58, 63, 67) and tried together. The complaints are identical so far as the charges of negligence are concerned (Tr. 4, 25, 42). There are eight separate charges of negligence set up in separate sub-paragraphs. Five of these charges alleged violation of certain sections of the Motor Vehicle Law of Illinois. The other three charge specific acts of negligence on the part of your petitioner.

Motions were made by your petitioner for directed verdicts and for findings of not guilty as to each of the charges laid in the complaints, both at the close of the respondents' cases (Tr. 286-296) and at the close of all of the evidence (Tr. 470-480). These motions were overruled by the trial court, the cases were submitted to the jury, verdicts were returned in favor of the respondents (Tr. 495-497), and judgments were entered on the verdicts (Tr. 498). Thereafter your petitioner filed its motion for judgments notwithstanding the verdicts (Tr. 499), which the trial court overruled (Tr. 507). The Circuit Court of Appeals has affirmed these judgments (Tr. 528).

The occurrence in question took place shortly after ten o'clock on the evening of April 4, 1939, on Skokie Highway, also known as U. S. Route 41, at a point

thereon north of Tower Road and to the east of the water tower (Tr. 71, 81, 103, 150, 126, 221-223), and within the corporate limits of the Village of Glencoe, Illinois (Tr. 307-309). Skokie Highway is a paved 4-lane highway, 40 feet or more in width, straight and level, and runs in a general northerly and southerly direction. The weather was clear and the pavement was dry (Tr. 92, 104, 225, 248).

Shortly before the occurrence complained of four large trucks of the trailer-tractor type, which had been proceeding along Skokie Highway in a southerly direction, had come to a stop on the southbound or westerly traffic lane of the highway near the scene of the occurrence. The occasion for the stopping of these trucks was that the one furthest to the north and the first to arrive, had pulled almost wholly off the pavement onto the shoulder and, the shoulder being soft, the wheels had sunk down to such an extent that the driver was unable to get it back onto the pavement (Tr. 72). The drivers of these trucks had lighted some fusees and perhaps had set out a few kerosene torches (Tr. 97). Shortly thereafter three trucks belonging to your petitioner arrived from the south, traveling north, and came to a stop in the easterly or outside traffic lane (Tr. 73). When they came to a stop the rear end of your petitioner's truck, which was furthest to the south, was, according to the respondent's proof, 30 to 40 feet to the north of the rear end of the most northerly of the trucks on the opposite side of the highway (Tr. 86). The lights were burning on the rear of your petitioner's trucks (Tr. 80, 88).

Shortly thereafter the car in which the respondents were riding, driven by the respondent, Miller, approached from the south, also traveling in the outside northbound traffic lane. The brakes were applied (Tr.

80), the car proceeded straight ahead (Tr. 150, 175), and collided head-on with the center of the rear of your petitioner's truck. Skid marks left by the car measured 75 feet to the rear (Tr. 124). The speed of the car at the time of the impact was variously estimated by the respondents themselves at 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), and 12 to 20 miles per hour (Tr. 235).

There was no traffic or obstruction in the traffic lanes to the west of your petitioner's truck (Tr. 149, 150). Respondents had 30 or more feet of clear pavement on which to pass this truck, had they been observant.

Basis of Jurisdiction.

This Court has jurisdiction to review said decision under Section 240 of the Judicial Code (28 U. S. C. A. Section 347).

The judgment of the United States Circuit Court of Appeals for the Seventh Circuit was rendered in said cause on March 2, 1942. Your petitioner's petition for re-hearing of the said cause was denied by said court on April 6, 1942, making its judgment final as of that date.

Questions Presented.

The questions presented are questions of law and are:

1. Whether or not the trial court erred in refusing to instruct the jury to return verdicts finding your petitioner not guilty and in overruling your petitioner's motion for judgments notwithstanding the verdicts. Your petitioner contends:

(a) That the evidence is insufficient to support the verdicts, and

(b) That there is a fatal variance between the allegations of the respondents' complaints and their proof adduced on the trial.

2. Whether or not the Circuit Court of Appeals has properly applied the law of Illinois to the facts as shown by the evidence. Your petitioner contends:

(a) That under the law of Illinois, the respondents failed to prove their case as alleged in their complaints;

(b) That the Circuit Court of Appeals has misconstrued and misapplied certain statutes of the State of Illinois, the alleged violation of which were relied upon by respondents; and

(c) That the law as laid down in the opinion of the Circuit Court of Appeals is in conflict with that laid down in the opinions of the courts of Illinois.

3. Whether or not the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the evidence. Your petitioner contends:

(a) That the facts as stated by the Circuit Court of Appeals in its opinion do not disclose the true purport of the evidence, and

(b) That had the Circuit Court of Appeals not overlooked or misapprehended certain of the facts proved by the respondents themselves it would have reversed the judgment of the trial court.

Reasons Relied on for Allowance of the Writ.

The reasons relied on for the allowance of the writ are as follows:

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

As illustrative of the extent to which the Circuit Court of Appeals overlooked or misapprehended the facts as shown by the proof, your petitioner calls this Court's attention to the following:

(a) In the seventh paragraph of its opinion, after stating that at a point about 300 to 500 feet south of the point of the collision, the respondents noticed the red lights on the west side of the highway, the court states:

> "That after discovering the situation, the speed of the car was reduced to about 10 miles per hour."

In the sixteenth paragraph of its opinion the court makes a similar statement: "The speed of the car was reduced to some 10 or 12 miles per hour." These statements are contrary to the respondents' proof. Their proof shows that the car in which they were riding skidded a distance of 75 feet (Tr. 124), on a dry pavement (Tr. 92, 104, 225, 248), before it was stopped by coming into collision with the defendant's truck and that at the time of the impact, according to their own estimates, was still traveling 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 168-169), and between 12 and 20 miles per hour (Tr. 235). There is no evidence in the record that the speed of the car was reduced to 10 miles per hour or even 12.

(b) A little further along in the seventh paragraph of its opinion, the court state:

> "The atmosphere was variously described as murky or reddish from the reflection of the fusees, a sort of Indian summer haze, or as a slight smoke or fog."

The existence of this supposed smoke or fog and its apparent density are quite material in considering the question of the exercise of ordinary care on the part of the respondents. It is apparent that the court

overlooked the testimony of the respondent, Miller, the driver of the car in question, that the supposed smoke or fog was so dense that his lights did not illuminate the highway at all and that he would not say that he could see as much as 10 feet ahead of his car (Tr. 274). Also of the respondent, Foster, who was seated in the front seat with Miller, that it was practically impossible to see through the smoke (Tr. 232).

(c) In the eighth paragraph of its opinion the court say:

> "Two matters are seriously controverted: (1) Were there any lights on the rear of the truck with which the plaintiffs' car collided, * * *"

It is respectfully submitted that there could be no controversy about this. The respondents proved by two witnesses that the lights were burning on the rear of the defendant's truck at the time of the occurrence (Tr. 80, 88). Your petitioner's proof was in accord with this and shows conclusively that such was true (Tr. 338, 339, 359, 389, 399, 406, 430, 444). No witness testified that they were not, not even the respondents themselves. The respondents testified that they did not see any such lights, but they did not testify that there were none. The only controversy about the lights was that raised by the respondents in the Circuit Court of Appeals between the testimony of their own witnesses that there were lights on the rear of the truck and what they wished the court to infer from their own testimony that they did not see any lights.

(d) At the beginning of the sixteenth paragraph of its opinion the court say:

> "It is not contended that the plaintiffs were driving at an excessive rate of speed."

It is respectfully submitted that the court, in making this statement, overlooked one of the main contentions

of your petitioner, both in the trial court and on the appeal. The respondents' own proof, it is respectfully submitted, shows that they were. It could hardly be contended that a car which skidded a distance of 75 feet on a dry pavement and was still traveling at a speed up to 25 miles per hour was not being driven at an excessive rate of speed. Furthermore, your petitioner's proof shows that the respondents' car approached the scene of the occurrence at about 70 to 80 miles per hour (Tr. 360), and that at the time it passed the most northerly of the trucks on the opposite side of the highway was still traveling about 60 to 70 miles per hour (Tr. 368). Furthermore, your petitioner's proof shows that instead of skidding 75 feet, it skidded a distance of approximately 200 feet (Tr. 339, 388, 389, 408, 445). Your petitioner did contend both in the trial court and on appeal that the plaintiffs were driving at an excessive rate of speed, and that such excessive speed was the proximate cause of the occurrence.

Other instances in which the court overlooked or misapprehended the facts as shown by the evidence will be brought to the attention of the Court in the brief in support of this petition and annexed hereto.

2. The Circuit Court of Appeals failed to follow the law of Illinois, the state in which the occurrence took place and in which the trial was had, in arriving at its decision, and the law as laid down in the opinion of the court is in conflict with the decisions of the courts of Illinois.

(a) The court, in its opinion, overlooked the well-settled law of Illinois that the burden was on the respondents to prove that at and before the time of the occurrence they were in the exercise of ordinary care for their own safety,—that under the law of Illinois contributory negligence is not an affirmative defense.

(b) The court, in its opinion, overlooked the well-settled law of Illinois that the burden was on the respondents to prove that your petitioner was guilty of the negligence charged in their complaints and that such negligence, if any, was the proximate cause of their injuries.

(c) The court, in its opinion, overlooked the well-settled law of Illinois that liability cannot rest on surmise or conjecture, but must be established by affirmative, positive proof.

(d) The court has, in its opinion, misconstrued Sections 88, 103, 104 and 121 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1941, Chap. 95½, pars. 185, 200, 201 and 218), and has misapplied them to the plaintiffs' proof.

(e) The court was in error in holding that there was no variance between the respondents' proof and the allegations of their complaints.

(f) The law as laid down in the opinion of the Circuit Court of Appeals is in conflict with the law of Illinois as laid down in numerous decisions of the courts of Illinois.

3. That the Circuit Court of Appeals was in error in failing to find from the proof adduced on the trial and under the law of Illinois that the respondents are not entitled to recover.

Prayer.

Wherefore, your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit, commanding said court to certify to this Court a full and complete transcript of the record and all proceedings had in said Circuit Court of Appeals in this cause entitled, "Arthur F. Miller, Thomas G. Foster, Richard J. Browne, Edward J. Shoffner and

Albert F. Wagner, vs. Advance Transportation Company, a corporation," being Cause No. 7744 in said court, to the end that said cause may be reviewed and determined by this Court, as provided by statute, and that the judgment of the said Circuit Court of Appeals may be reversed by this Court.

Respectfully submitted,

ADVANCE TRANSPORTATION COMPANY,
a corporation, petitioner.
By JOSEPH H. HINSHAW,
Its attorney.

OSWELL G. TREADWAY,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals was rendered March 2, 1942 (Tr. 519). Rehearing was denied April 6, 1942 (Tr. 555). The case is reported as *Miller, et al.* v. *Advance Transp. Co.,* No. 7744, in 126 Fed. (2d) 442. The opinion is set out in an appendix to this brief.

Jurisdiction.

This Court has jurisdiction to review the decision of the Circuit Court of Appeals under Section 240 of the Judicial Code (28 U. S. C. A., Sec. 347). Federal jurisdiction was originally invoked on the ground of diversity of citizenship, the amount of damages claimed being in excess of $3,000.00.

The grounds for invoking the jurisdiction of this Court are outlined in the petition for writ of certiorari and are briefly as follows:

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof.

2. The Circuit Court of Appeals failed to follow the law of Illinois and the law as laid down in its opinion is in conflict with the decisions of the Illinois courts.

3. That under the law of Illinois and the proof adduced on the trial the plaintiffs are not entitled to recover.

Statement of the Case.

The respondents, herein referred to as plaintiffs, seek to recover damages for personal injuries sustained when

an automobile in which they were riding collided with the rear end of a tractor and trailer truck belonging to the petitioner, herein referred to as defendant. The case was tried before a court and jury, verdicts were returned for the plaintiffs and judgments were entered by the trial court on the verdicts. Motions were made by the defendant for directed verdicts and for findings as to each of the charges laid in the complaints, both at the close of the plaintiffs' case and at the close of all of the evidence, which were overruled by the trial court. A motion for judgments notwithstanding the verdicts was interposed and was also overruled by the trial court. The Circuit Court of Appeals has affirmed the judgments of the trial court.

The occurrence in question took place shortly after 10:00 o'clock on the evening of April 4, 1939, on Skokie Highway, also known as U. S. Route 41, at a point thereon north of Tower Road and to the east of the water tower (Tr. 71, 81, 103, 150, 126, 221-223), and within the corporate limits of the Village of Glencoe, Illinois (Tr. 307-309). Skokie Highway is a paved 4-lane highway, 40 feet or more in width, straight and level, and runs in a general northerly and southerly direction. Traveling from the south it angles somewhat to the west (Tr. 309).

The plaintiffs' evidence tends to prove the following facts:

A short time prior to the occurrence complained of, Zeno Tokarczyk, the driver of a truck belonging to the Bartzen Transportation Company, while proceeding in a southerly direction upon Skokie Highway, drove his truck off the pavement and onto the west shoulder of the highway and stopped at a point thereon directly east of the water tower (Tr. 71) for the purpose of flagging down another Bartzen truck pulling out from Chi-

cago and to get a key for the Racine terminal (Tr. 71). After obtaining the key the northbound truck went on and the driver returned to his own truck, where he found that the wheels had sunk down into the shoulder to such an extent that he was unable to get it back onto the pavement. Thereupon his helper flagged down a Checker Express truck which pulled up a little ahead of the Bartzen truck and stopped. The driver of the Checker truck got a chain from his truck with which they were making preparations to pull the Bartzen truck back onto the pavement. In the meantime a third truck, belonging to the Trans-American Line, arrived from the north and stopped a short distance to the south of the Checker truck (Tr. 73). A fourth truck arrived from the north, a Gateway, which stopped a short distance to the south of the Trans-American truck (Tr. 76). Each of these trucks had six wheels and was of the tractor and semi-trailer type. They were about 35 feet in length and stopped at least 15 feet apart (Tr. 81). The drivers of these trucks had lighted some fusees which were strung along the west side of the road. How many, the evidence does not definitely disclose, but there were perhaps six or eight (Tr. 97). There were also, perhaps, a few kerosene pot torches set along the west side of the pavement.

When the Checker truck attempted to pull the Bartzen truck back onto the pavement, the chain, by which it had been attached, broke. Thereupon the Trans-American driver got a cable out of his tool chest and brought it back for the drivers of these trucks to use (Tr. 73). At about this time three trucks belonging to the defendant arrived from the south and came to a stop on the pavement in the east traffic lane (Tr. 73). When they came to a stop the rear end of the defendant's truck which was furthest to the south, according to the plaintiffs' proof, was 30 to 40 feet to the north

of the rear end of the Bartzen truck (Tr. 86). The lights were burning on the rear of the defendant's trucks (Tr. 80, 88).

The plaintiffs were engineers employed by the Johns-Manville Corporation at Waukegan, Illinois (Tr. 134, 154, 179, 199, 243). They had driven in from Waukegan to the Y.M.C.A. in Chicago that evening to attend a lecture and, at the time of the occurrence, were on their way home. The car, a Lincoln Zephyr, was owned and driven by the plaintiff Miller. The plaintiff Foster was seated in the front seat with Miller, and the other three in the back, Shoffner on the right, Wagner in the center and Browne on the left (Tr. 135, 155, 180, 201, 246). They were traveling north.

According to their testimony, they approached the place of the occurrence in question at a speed of 40 to 45 miles per hour (Tr. 135, 166, 202, 246, 247). The car was being driven with the town or dim lights (Tr. 225, 228, 273, 274). They were unable to estimate how far forward these lights made objects on the road visible (Tr. 274, 225, 228). Miller testified that he did not change the lights as he approached the place of the occurrence (Tr. 275). The plaintiff Foster testified that when they arrived in the vicinity of the trucks the speed was decreased to between 30 and 33 miles an hour (Tr. 232) but the plaintiff Miller, the driver, testified he could not tell how much he decelerated the speed (Tr. 274). The plaintiff Wagner testified he first saw the truck when it was 40 to 50 feet away (Tr. 137, 148, 181). The plaintiff Foster saw it when it was 65 to 75 feet ahead (Tr. 207). The other plaintiffs apparently did not see it until just before the impact. The brakes, however, were applied, there was a screeching of brakes or tires that lasted for some time (Tr. 80), the car proceeded straight ahead (Tr. 150, 175), and collided head-

on with the center of the rear of the defendant's truck. Skid marks left by the car measured 75 feet to the rear (Tr. 124). The speed of the car at the time of the impact was variously estimated at 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), and 12 to 20 miles per hour (Tr. 234).

The weather was clear and the pavement was dry (Tr. 92, 104, 225, 248). There was no traffic or obstruction in the traffic lane to the west of the defendant's truck (Tr. 149, 150). The plaintiff Foster testified that as they were passing the trucks on the west side of the road he saw a flashlight flashing from left to right about 60 to 65 feet ahead of them on the road (Tr. 205, 236, 237), and that he told Miller that there must be something wrong (Tr. 237).

The plaintiffs testified that the fumes and smoke from the fusees gave the atmosphere a reddish glow which a slight wind carried to the east side of the road and which obscured their view (Tr. 136, 147-148, 157, 175, 181, 203, 233, 247, 248, 273, 275). The plaintiffs were in disagreement as to how much it obscured their view, but the plaintiff Miller, who was driving the car, testified that it obscured his vision to such an extent that his lights did not illuminate the highway at all and that he would not say that he could see as much as 10 feet ahead (Tr. 274). He also testified that he had no idea of the speed at which he traveled through it; that it covered an area of 50, 60, or 70 feet; that he did not change his lights when he got into the smoke; and that he had no idea what distance would be required, at the speed he was driving, for him to stop (Tr. 274, 277).

While the questions raised on the appeal are questions of law and not of fact, and the defendant's evidence on conflicting questions of fact may be disregarded, the defendant's proof emphasized certain of the

material facts proven by the plaintiffs themselves. Witnesses for the defendant, most of them disinterested, testified that the lights were burning on the rear of the defendant's truck before and at the time of the occurrence (Tr. 338, 339, 359, 389, 399, 406, 430, 444). Witnesses for the defendant also testified concerning the skid marks left by the car in which the plaintiffs were riding, but to the effect that the car in which the plaintiffs were riding skidded not 75 feet, as their proof showed, but a distance of 200 feet (Tr. 339, 388, 389, 408, 445). A disinterested witness for the defendant testified that the car in which the plaintiffs were riding approached the scene of the accident at a speed of from 70 to 80 miles per hour (Tr. 360) and that as it passed the line of trucks on the west side of the highway it was still traveling from 60 to 70 miles per hour (Tr. 368). The plaintiffs produced no evidence outside their own testimony that the smoke or smudge emitted by the fusees or kerosene torches was sufficient to interfere with their vision. Other witnesses, most of them disinterested, testified to the effect that the smoke or smudge, if any, emitted was negligible and did not interfere with visibility at all (Tr. 339, 361, 401, 425, 431, 440, 441).

Specification of Errors.

1. The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

2. The Circuit Court of Appeals has misconstrued the statutes of Illinois relied upon by the plaintiffs; has misinterpreted the law as laid down in the decisions of the Illinois courts; and the law as laid down in its opinion is in conflict with the holdings of the Illinois courts.

3. The court erred in holding that the plaintiffs sustained the burden of producing sufficient proof of the exercise of ordinary care on their own parts to entitle them to have their cases submitted to the jury.

4. The court erred in refusing to hold that the plaintiffs were guilty of contributory negligence as a matter of law.

5. The court erred in refusing to find, as a matter of law, from the record that the proximate cause of the occurrence complained of was the negligence of the plaintiff Miller, and not any negligence on the part of the defendant.

6. The court erred in holding that there was sufficient evidence of negligence on the part of the defendant to make the question of the defendant's negligence one of fact.

7. The court erred in refusing to find, as a matter of law, that the defendant was not guilty of any negligence which was a proximate cause of the plaintiffs' injuries.

8. The court erred in refusing to find, as a matter of law, that the stopping of the defendant's truck on the highway merely created a condition that made the occurrence in question possible and that such stopping was not the proximate cause of the occurrence.

9. The court erred in holding that there was no variance between the plaintiffs' proof and the material allegations of their complaints.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

(See Argument.)

II.

The Circuit Court of Appeals failed to follow the law of Illinois governing the burden of proof.

1. The occurrence complained of took place in Illinois. The plaintiffs' causes of action, if any, are governed by the law of that state. Under these circumstances it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions.

Erie R. Co. v. *Tompkins,* 304 U. S. 64 at 80.

West v. *American Telephone & Telegraph Co.,* 311 U. S. 223 at 236-237.

Fidelity Trust Co. v. *Field,* 311 U. S. 169 at 177.

2. The law of Illinois is well settled that, in an action of this kind, the burden is on the plaintiff to prove freedom from contributory negligence on his own part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of his injuries.

Dee, Admr. v. *City of Peru,* 343 Ill. 36 at 41.

Wilson v. *I. C. C. R. R. Co.,* 210 Ill. 603 at 606.

Munsen v. *Illinois Northern Utilities Co.,* 258 Ill. App. 438 at 444.

3. It is also well-settled law in Illinois that a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture.

Rittler v. *Industrial Com.,* 351 Ill. 338 at 353.

Deming v. *Hallberg,* 221 Ill. App. 180 at 183.

McCormick H. M. Co. v. *Gabris,* 130 Ill. App. 624 at 631.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

Cooney v. *F. Landon Cartage Co.,* 308 Ill. App. 444 at 451; Pet'n for lv. to app. denied by Supreme Court, 308 Ill. App. xv.

Hogrefe v. *Johnson,* 271 Ill. App. 469 at 474.

Johnson v. *Kushler,* 269 Ill. App. 533 at 561.

James v. *Motor Transit Management Co.,* 260 Ill. App. 246 at 256-257.

Collins v. *McMullin,* 225 Ill. App. 430 at 432-433.

Boylon v. *Reliable Cartage Co.,* 258 Mich. 5 at 9, 242 N. W. 231.

Levine v. *Bishop,* 292 Mass. 277 at 279, 198 N. E. 146.

Billingsley v. *McCormick Transfer Co.,* 58 N. D. 913 at 920; 228 N. W. 424.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with the dim lights only, particularly when the bright lights were available.

Scruggs v. *Baltimore & O. R. Co.,* 287 Ill. App. 310 at 315.

Johnson v. *Kushler,* 269 Ill. App. 553 at 561.

Johandes v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328 at 331-332.

Sugru v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99 at 103.

3. If the "smoke," "fumes," "fog" or "smudge" from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

Johandes v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328 at 331-332.

Hazel v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125 at 132; aff. 310 Ill. 38.

Ill. Cent. R. R. Co. v. *Oswald,* 338 Ill. 270 at 275.

Dominick v. *Haynes Bros.,* 13 La. App. 434 at 435; 127 So. 31.

Bong v. *Webster,* 217 Ky. 781 at 786; 290 S. W. 662.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

Dee v. *City of Peru,* 343 Ill. 36 at 42.

Willgeroth v. *Maddox,* 281 Ill. App. 480 at 485; 286 Ill. App. 622.

Opp v. *Pryor,* 294 Ill. 538 at 547.

Pienta v. *Chicago City Ry. Co.,* 284 Ill. 246 at 259.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

Briske v. *Village of Burnham,* 308 Ill. App. 531 at 536.

Geisen v. *Luce,* 185 Minn. 479 at 484; 242 N. W. 8.

Coleman v. *C. B. & Q. R. Co.,* 287 Ill. App. 483 at 490.

Jaggers v. *Southeastern Greyhound Lines,* 34 F. Supp. 667 at 669-670.

Gilbert v. *Goralnik,* 238 Ill. App. 199 at 203-204.

Munsen v. *Ill. Northern Utilities Co.,* 258 Ill. App. 438 at 443.

James v. *Motor Transit Management Co.,* 260 Ill. App. 246 at 257.

Gilman v. *Central Vermont Railway,* 93 Vt. 340 at 343; 107 Atl. 122.

Probert v. *Chicago I. & L. Ry. Co.,* 93 Fed. (2d) 259 at 261.

Orton v. *Penn. R. Co.,* 7 Fed. (2d) 36 at 38.

6. The proximate cause of the occurrence complained of was the negligence of the driver of the car in which the plaintiffs were riding and the plaintiffs are not entitled to recover.

Roanoke R. & Elec. Co. v. *Whitner,* 173 Va. 253 at 260; 3 S. E. (2d) 169.

Jaggers v. *Southeastern Greyhound Lines,* 34 F. Supp. 667 at 669.

Geisen v. *Luce,* 185 Minn. 479 at 484; 243 N. W. 8.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

1. As to the charges laid in sub-paragraph 9 (a).

See Argument.

2. As to the charges laid in sub-paragraph 9 (b).

Miller v. *Erickson, et al.,* 76 Fed. (2d) 598 at 599.

3. As to the charges laid in sub-paragraph 9 (c).

Uniform Act Regulating Traffic on Highways, Sec. 104.

Ill. Rev. Stat., 1941, Chap. 95½, par. 201.

4. As to the charges laid in sub-paragraph 9 (d).

Uniform Act Regulating Traffic on Highways, Sec. 103, Ill. Rev. Stat., 1941, Chap. 95½, par. 200.

5. As to the charges laid in sub-paragraph 9 (e).

Miller v. *Erickson, et al.,* 76 Fed. (2d) 598 at 599.

6. As to the charges laid in sub-paragraphs 9 (f) and 9 (g).

Uniform Act Regulating Traffic on Highways, Sec. 88, Ill. Rev. Stat., 1941, Chap. 95½, par. 185.

7. As to the charges laid in sub-paragraph 9 (h).

Uniform Act Regulating Traffic on Highways, Sec. 121, Ill. Rev. Stat., 1941, Chap. 95½, par. 218.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

Brodsky v. *Frank,* 342 Ill. 110 at 116.

Buckley v. *Mandel Bros.,* 333 Ill. 368 at 373-374.

Feder v. *Midland Casualty Co.,* 316 Ill. 552 at 559.

Civil Practice Act, Illinois, Sec. 46 (3).

Ill. Rev. Stat., 1941, Chap. 110, par. 170.

Rules of Civil Procedure for the District Courts, Rule 15.

ARGUMENT.

I.

The Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the proof and the facts as stated in its opinion do not disclose the true purport of the evidence.

It is true, of course, that where a court is called upon to determine as a matter of law whether a plaintiff's evidence is sufficient to sustain a verdict in his favor, the court cannot weigh the evidence on a disputed question of fact, but may and, as a general rule, should, consider only the plaintiff's evidence, together with the legitimate inferences to be drawn therefrom, concerning such fact, and reject such evidence of the defendant as may be in conflict therewith. It was, therefore, proper, in the case at bar that the Circuit Court of Appeals should view the plaintiffs' evidence in the light most favorable to them. It is, however, respectfully submitted that in its consideration of the evidence the court overlooked or misapprehended many of the controlling facts adduced by the plaintiffs' proof and that the facts as stated in its opinion do not disclose the true purport of their evidence.

In the sixth paragraph of its opinion the court say:

> "Reid, the driver of the truck with which the plaintiffs' car collided, after stopping, went to the west side of the highway to help protect southbound traffic."

Near the end of the thirteenth paragraph of the opinion the court assume that Reid was "protecting southbound traffic." Whether or not Reid, after stopping,

went to the west side of the highway was a disputed question of fact and the court was justified in assuming as true the plaintiffs' evidence on this question. But there is no proof in the record, nor any evidence from which it could be inferred, that the purpose of his going, if he did go, was "to protect southbound traffic." The proof is that there was no southbound traffic to protect. While the question of whether Reid went to the west side of the highway and the purpose of his going are probably immaterial, it becomes important here only for the reason that in arriving at its decision the court has labored under the misapprehension that under the circumstances in evidence there was a duty on the part of the defendant "to protect" oncoming traffic, although no such duty was even alleged in the plaintiffs' complaints.

In the seventh paragraph of its opinion, after stating that the plaintiffs, at a point about 300 to 500 feet south of the point of the collision, noticed the red lights, etc., the court say:

> "and that after discovering the situation, the speed of the car was reduced to about 10 miles per hour."

A similar statement is made in the sixteenth paragraph of the opinion where the court say: "The speed of the car was reduced to some 10 or 12 miles an hour." It is respectfully submitted that there is no testimony in the record on which either of these statements could be based. The testimony of the plaintiffs is quite clear that such was not the fact. The plaintiff Foster testified that when they arrived in the vicinity of the truck the speed was decreased to between 30 and 33 miles an hour (Tr. 232). Their proof shows that the car in which they were riding skidded a distance of 75 feet before it was stopped by coming into collision with the defendant's truck (Tr. 124). The plaintiff Wagner testi-

fied that the car was still traveling at about 25 miles an hour at the time of the impact (Tr. 144, 149). The plaintiff Shoffner testified that at the time of the impact it was still traveling 15 to 18 miles per hour (Tr. 168-169). Plaintiff Foster testified that at the time of the impact the car was traveling between 12 and 15 miles per hour (Tr. 207), and on cross-examination that it was traveling somewhere between 12 and 20 miles per hour (Tr. 235). The only evidence produced by the plaintiffs as to the speed at which the car was traveling at any time was their own testimony, and that is in wide disagreement with the statement made by the court. It will also be noted that the court has not in its opinion considered the plaintiffs' proof that the car in which they were riding skidded a distance of 75 feet, nor the speed at which it was traveling at the time of the impact.

Had the court not overlooked this important part of the plaintiffs' proof its decision would, no doubt, have been different. The fact that the car skidded a distance of 75 feet on a dry pavement and was still traveling at a speed estimated to be as high as 25 miles an hour, or even their lower estimates, shows clearly that it did not approach the scene of the occurrence at a reasonable rate of speed. The fact that it skidded this distance indicates strongly that the driver must have seen the defendant's truck when he was at least that distance from it and that he had ample opportunity to turn into the inner lane to pass it if the speed at which he was driving had not been excessive. The plaintiffs' proof in this respect, we submit, refutes any contention that the driver of the car in which they were riding was in the exercise of ordinary care.

A little further on in the seventh paragraph of its opinion the court say:

> "The atmosphere was variously described as murky or reddish from the reflection of the fusees, as sort of an Indian Summer haze, or a slight smoke or fog."

It is respectfully submitted that the court has overlooked the material testimony of the plaintiffs with regard to this supposed smoke or fog. The only evidence the plaintiffs produced concerning it was their own testimony. The plaintiff Miller, who was driving the car, testified that the supposed smoke or fog obscured his vision to such an extent that he would not say that he could see as much as 10 feet ahead of the car (Tr. 274). The plaintiff Foster, who was sitting in the front seat, on cross-examination, testified to the effect that it was practically impossible to see through the smoke (Tr. 232).

While it seems quite improbable that a few fusees and kerosene torches could emit such a volume of smoke or fog, and while it may be that the court did not believe their testimony, if it was considered, nevertheless, so far as these plaintiffs are concerned, their testimony must be taken as a true statement of the condition as it appeared to them at the time they proceeded to drive through it. It could hardly be said that it was the exercise of ordinary care on their part to proceed without taking precautions commensurate with the conditions as they appeared to them.

A little further on in the seventh paragraph of the opinion the court quotes from the testimony of the plaintiff Foster. This is taken from his testimony as it appears on page 205 of the Transcript. It is respectfully submitted, however, that the plaintiff Foster contradicted himself on almost every essential fact to which he testified. It will be noted from this quoted part of his testimony that the plaintiffs had passed

the truck which was in the ditch when he turned his vision forward and saw this "indistinct light." In the sixth paragraph of its opinion the court state that the rear end of the defendant's truck was 30 or 40 feet north of the rear end of the Bartzen truck, the one in the ditch. This, we believe, is in accord with the plaintiffs' proof. In the eighth paragraph of the opinion the court points to Foster's further testimony that he saw a flashlight 8 to 10 feet to the rear of the truck, and that at that time the plaintiffs were about 65 feet away. It is quite apparent that if the rear of the defendant's truck was only 30 to 40 feet north of the Bartzen truck and that if the plaintiff Foster did not turn his vision forward until the plaintiffs had passed this Bartzen truck, they could not have been 65 feet away from the defendant's truck or the flashlight which Foster testified was 8 to 10 feet to its rear.

It will also be noted from the quoted part of his testimony that Foster stated "he made a movement to nudge Mr. Miller," when he saw the flashlight ahead. Foster later testified that he spoke to Miller about it; that "as I recall, I said there is something wrong here." (Tr. 237.) It is respectfully submitted that Foster's testimony as to what took place at the time can hardly be said to be sufficiently definite to amount to proof, at least of any specific fact.

Toward the end of the eighth paragraph of its opinion the court say:

> "Two matters are seriously controverted: (1) Were there any lights on the rear of the truck with which the plaintiffs' car collided, and (2) did the collision occur within or without the incorporated limits of the Village of Glencoe?"

It is respectfully submitted that there was no real controversy concerning either of these questions. With

regard to the question of lights on the rear of the truck, no witness, not even the plaintiffs themselves, testified that the lights were not burning at the time of the occurrence. The plaintiffs produced two witnesses who testified that they were burning at the time (Tr. 80, 88). Their testimony was corroborated by a number of witnesses, most of them disinterested, called by the defendant (Tr. 338, 339, 359, 389, 399, 406 430, 444). None of the plaintiffs testified that there were no lights on the truck, but merely that they did not see any. They produced as a witness an ex-highway policeman, who arrived at the scene of the accident some 20 minutes later, who testified that at that time the lights were not burning. But he also testified that when the connection was made they came on and that the truck was fully equipped with lights (Tr. 121-122). The controversy, therefore, if any there was, was not between the testimony of witnesses for the plaintiffs and those for the defendant, but as outlined in the eleventh paragraph of the court's opinion between the testimony of certain witnesses produced by the plaintiffs and what they wished the court to infer from their own testimony. In other words, a controversy between the testimony of their own witnesses to the effect that the lights were burning on the truck and the inferences, if any, drawn from their testimony that they did not see any lights on the truck. It is respectfully submitted that such a controversy is of no importance. Under the law of Illinois inferences cannot be weighed against evidence and, where the plaintiffs are relying on negligence in failing to have the lights burning on the truck, the burden was on them to prove the absence of such lights and not to merely create a supposed controversy within their own proof as to whether the lights were or were not burning.

Nor was there any real controversy as to whether limits of the Village of Glencoe. The plaintiffs allege in their complaints that the collision occurred outside any corporate limits and at a point approximately one-half mile north of Willow Road (Tr. 23, 24). On the trial they and their witnesses were in agreement that the accident took place not at the point alleged in the complaints, but at a point a mile or so further north and opposite a large water tower. A map introduced in evidence (Tr. 309) shows that the place of the accident was within the corporate limits of the Village of Glencoe. The controversy here is not on the place where the accident occurred, but, on the contrary, on the question of whether, having alleged the place of occurrence to be a certain point on the highway, and without the corporate limits of any municipality, and having proved it to have taken place at a different point on the highway which is within the corporate limits of a village, they are entitled to the benefit of certain statutes of the State of Illinois which have no application within the corporate limits of such village, on the theory that the defendant did not, in its answers, specifically deny these allegations of their complaints. This question will be further discussed a little further on in the brief.

In the eleventh paragraph of its opinion the court say:

> "There is evidence to the effect that a suitable place was available a short distance north of the point where the defendant's trucks were stopped where they could have parked off the pavement."

It is respectfully submitted that the plaintiffs' evidence in this regard is immaterial. In the first place, there was no reason why the defendant should have parked its trucks off the pavement since there was some 30 feet or more of unobstructed highway for the use of other vehicles at the time. In the second place,

the plaintiffs produced no evidence that the defendant's drivers knew of any such place, even if they could have made use of it. In the third place, the evidence shows that this supposed place was the entrance to a roadhouse some distance north (Tr. 107) and was, of course, private property, not a parking place for trucks. And in the fourth place, the distance to this particular place, as it measures on the map in evidence (Tr. 309), from the place of the occurrence is practically a quarter of a mile.

A little further along in the same paragraph the court say:

> "The evidence as to the absence of any lights on the rear of the truck in question is rather meager."

We believe we have sufficiently considered the plaintiffs' proof concerning the lights. The court state, however, that there is the testimony of all the plaintiffs that they were looking in that direction and saw no lights of any kind. It is respectfully submitted that their testimony in that regard is no more reliable than that of the plaintiff Foster quoted in the seventh paragraph of the opinion in which he stated that he turned his vision forward after they had passed the truck which was in the ditch and which, according to the plaintiffs' proof, was only 30 or 40 feet south of the truck with which they collided. If the plaintiffs were looking forward and failed to see the lights on the truck in question, their testimony in that regard merely proves that they were not observant of what was clearly observable, and were not in the exercise of ordinary care for their safety.

A little further on in the same paragraph, after discussing the testimony of one of the plaintiffs' witnesses, the court say:

"An inference of this kind, however, is largely destroyed by Reid's demonstration."

Why this should be true is not apparent from the court's opinion. This witness testified that Reid went between the trailer and tractor, did something and the lights went on (Tr. 102). It is common knowledge, that the lighting system of a trailer is connected with that of the tractor by a plug and socket. It is quite evident that a car, such as the one in question with five men in it, driving into the rear of the trailer part of this truck at a speed estimated to be as high as 25 miles per hour would give the truck a considerable jolt and might well loosen the plug from its socket. The inference, if any, to be made from Reid's demonstration, it is respectfully submitted, is that just this thing happened. The material facts testified to by this witness, however, is that after the connection was made the lights were all burning on the rear of the truck and that it was well equipped with lights (Tr. 121-122).

At the end of this paragraph, in discussing the testimony of Witness Tokarzcyk, who testified definitely that when he saw the defendant's trucks facing north, north of his truck, that they had lights on the rear (Tr. 80), the court say:

"This witness also testified, however, that he saw two trucks only and inasmuch as it is conceded there were three, such testimony proves nothing insofar as the third truck was concerned."

It is respectfully submitted that this is not a correct interpretation of this witness' testimony. It will be noted from his testimony (Tr. 73) that his testimony concerning the number of trucks was based on his observation as they approached and while he was attempting to pull the Bartzen truck onto the pavement. It will also be noted that his testimony with regard

to the lights was made with reference to what he observed after these trucks had passed to the north of his truck (Tr. 80).

But Witness Tokarczyk was not the only witness produced by the plaintiffs who testified that the lights were burning on the rear of the defendant's truck. Witness Thuerek testified that this particular truck had lights on it (Tr. 88). It is respectfully submitted that the testimony of these witnesses disproved the plaintiffs' charges that there were no lights on the rear of the truck in question.

At the beginning of paragraph sixteen of its opinion the court states:

> "It is not contended that the plaintiffs were driving at an excessive rate of speed."

It is respectfully submitted that the court, in making this statement, wholly lost sight of the defendant's theory of the case. It would seem that if the court had considered the plaintiffs' own proof that the car in which the plaintiffs were riding skidded a distance of 75 feet on a dry pavement and was still traveling at a speed as high as 25 miles per hour, or even 12 to 20 miles, the lowest estimate, at the time of the impact it would have come to the conclusion that they were driving at an excessive rate of speed, regardless of their contention that they had not been traveling in excess of 45 miles per hour. A disinterested witness for the defendant testified that the plaintiffs approached the scene of the occurrence at a speed of between 70 and 80 miles per hour (Tr. 360) and that at the time they arrived at the scene of the accident they were still traveling around 65 to 70 miles per hour. Witnesses for the defendant also testified that the skid marks left by the car measured not 75 feet, as the plaintiffs' proof showed, but approximately 200 feet (Tr. 339, 388,

389, 408, 445). The defendant did contend, both on the trial and in the Circuit Court of Appeals, that the plaintiffs were driving at an excessive rate of speed. The plaintiffs' proof, even though the defendant's evidence is disregarded, we submit, substantiates this contention.

For the reasons above stated, it is respectfully submitted that the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the evidence to such an extent that its judgment should be reviewed by this Court.

II.

The Circuit Court of Appeals failed to follow the law of Illinois governing the burden of proof.

1. The occurrence complained of took place in Illinois. The plaintiffs' causes of action, if any, are governed by the law of that state. Under these circumstances it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions.

The occurrence complained of took place within the limits of the State of Illinois. The plaintiffs' causes of action, if any they had, are governed by the Illinois law. The trial was had in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Illinois. Under these circumstances it has been well settled by this Court that both the District Court and the Circuit Court of Appeals are bound to follow the law of Illinois, both statutory and as it is laid down in the opinions of its courts. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 at 80; *West* v. *American Telephone & Telegraph Co.,* 311 U. S. 223 at 236-237; *Fidelity Trust Co* v. *Field,* 311 U. S. 169 at 177.

2. The law of Illinois is well settled that, in an action of this kind, the burden is on the plaintiff to prove freedom from contributory negligence on his own part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of his injuries.

The law of Illinois with respect to the burden of proof differs from that of many other states and the former practice in the Federal Courts of the Seventh Circuit, particularly on the question of contributory negligence. In Illinois the burden is on the plaintiff to prove the exercise of ordinary care on his own part or his freedom from contributory negligence, as well as proving that the defendant was guilty of the charges laid in his complaint, and that the negligence, if any, of the defendant was the proximate cause of his injuries. The rule is succinctly stated in the case of *Munsen* v. *Illinois Northern Utilities Co.,* 258 Ill. App. 438, where the Court say at page 444:

> "The burden of proof rested on appellant to show affirmatively: (1) that appellee was guilty of the negligence charged; (2) that such negligence was the proximate cause of the injuries in question; (3) that just prior to and at the time of said injury Burroughs was in the exercise of ordinary care for his own safety."

See to the same effect *Dee, Admr.* v. *City of Peru,* 343 Ill. 36, at 41, and *Wilson* v. *I. C. R. R. Co.,* 210 Ill. 603 at 606.

Under this rule if the plaintiffs failed to prove any one of these three propositions, the defendant was entitled to a verdict. And it follows that if the plaintiffs failed to produce any evidence tending to prove any one of them the trial court should have directed a verdict for the defendant.

3. It is also well-settled law in Illinois that a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture.

This rule is concisely stated in the case of *Deming* v. *Hallberg,* 221 Ill. App. 180, where the court say at page 183:

> "No damages can be assessed upon mere surmise or conjecture as to what possibly happened to cause the accident. The law requires affirmative, positive proof of actionable negligence as the proximate cause of injury suffered to warrant an assessment of damages. *International Harvester Co. of New Jersey* v. *Industrial Board,* 282 Ill. 489.
>
> "Proof that the negligence averred was the proximate cause of the accident cannot be dispensed with. *Curran* v. *Chicago & W. I. R. Co.,* 289 Ill. 111; *Sehnert* v. *Shipper & Block,* 193 Ill. App. 202."

See to the same effect *Rittler* v. *Industrial Com.,* 351 Ill. 338 at 353; *McCormick H. M. Co.* v. *Gabris,* 130 Ill. App. 624 at 631.

It is respectfully submitted that the Circuit Court of Appeals in its opinion lost sight of these well-established rules of Illinois law. In the eleventh paragraph of its opinion the court virtually admits that the plaintiffs' evidence concerning the absence of lights on the rear of the truck in question merely raises a doubt as to whether the lights were burning or not. But under these rules of law merely raising a doubt as to whether a fact existed is not sufficient. The burden was on the plaintiffs to produce some positive, affirmative proof that there were no lights. In the thirteenth paragraph of its opinion, in considering the charges of negligence laid in the plaintiffs' complaints, the court points to no evidence which tends to prove any of the charges. Under the law of Illinois it was incumbent upon the plaintiffs

to produce some positive, affirmative proof of at least one of the charges laid in their complaints. The court was apparently unable to state which, if any, of the charges was supported by the plaintiffs' proof. If they had produced any such proof there could have been no difficulty in pointing it out and the particular charge to which it was applicable. It is respectfully submitted that the court's discussion of the plaintiffs' proof with reference to these charges shows that the question of the defendant's negligence was left merely to conjecture or surmise.

It is respectfully submitted that the same is true with respect to the question of the plaintiffs' contributory negligence as considered by the court in paragraphs 14 and 15 of its opinion. Under the law of Illinois, it was incumbent upon the plaintiffs to prove that they were free from such negligence,—that they were in the exercise of ordinary care for their own safety. The court fails to point to any proof of ordinary care on the part of the plaintiffs and concludes in the sixteenth paragraph that they were confronted with "an extraordinary situation." But the court also points out that what it has termed "an extraordinary situation" was apparent to the plaintiffs long before they arrived at the scene of the occurrence. It then became incumbent upon them to take this into consideration as they approached it. Their proof, however, shows that they did nothing until they arrived within some 75 feet of the defendant's truck when the brakes were applied, but at that time it was too late at the speed at which they were traveling.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

The testimony of the plaintiffs themselves concerning the facts surrounding the occurrence is quite meager, hazy, indefinite and uncertain. Although they were all engineers, men of experience, and were in a position to know the facts, if they had been at all observant, according to their testimony they either knew little of what took place before and at the time of the occurrence, or were unwilling to disclose what they knew. They were reticent and evasive. This was particularly true of the plaintiffs, Miller, who was driving, and Foster, who occupied the front seat with him (Tr. 221-240, 270-280). About the only thing concerning which the plaintiffs agreed definitely was that they were not driving in excess of 45 miles per hour; that the car in which they were riding was driven straight into the rear of the defendant's truck, and that as a result of the collision they were injured. The only just deduction, we submit, that can be made from their testimony and that of the witnesses called by them is that the plaintiffs were not in the exercise of ordinary care for their own safety and that the proximate cause of their injuries was their own negligence.

The facts in the case at bar are quite similar to those in the case of *Cooney* v. *F. Landon Cartage Co.,* 308 Ill. App. 444. In that case the defendant's truck was being driven east on Route 64, which is also a 4-lane highway. The truck ran out of gas and the driver left it standing on the outer lane of the highway, while he proceeded to a gas station to purchase some gas. The

lights were burning on the rear of the truck. The plaintiff's intestate was driving a Plymouth, approaching from the west, and drove head-on into the back end of the truck, apparently without swerving to the right or left. Skid marks were left on the pavement estimated to be at least 100 feet in length. The court, in reversing a judgment for the plaintiff, say, at page 450:

> "Under the evidence, as given at the trial, the defendant seriously contends that plaintiff intestate was guilty of contributory negligence, and even conceding, which they do not, that the driver of the truck was negligent in the way he left his truck on the highway, the plaintiff is barred from recovery in this case.
>
> "The parties were called as witnesses that were riding in the Buick car at least 300 feet back of Earl T. Cooney, as he approached the truck in question. The majority of these people saw the lights on this truck at least four or five hundred feet from it. When they could see these lights, what was there to prevent Earl T. Cooney from seeing them in time to avoid a collision? There was no one approaching from the east and no one near him in the second east-bound lane of traffic, but from the evidence, it appears that he did not see the truck at all until within about 100 feet from it. This is indicated by the skid marks of his car. This court is reluctant to set aside a verdict of a jury for the reason that the evidence shows that the plaintiff's intestate was guilty of negligence which was the contributing cause to the injuries, but in this case it seems to us that if plaintiff's intestate had been observing the road ahead, he certainly should have seen the lights of the truck in the road in time to avoid a collision. Under the evidence in this case, the judgment cannot stand."

The court reversed the judgment and remanded the cause. Thereafter, on motion of the plaintiff, the remanding order was stricken and a petition for leave to

appeal filed in the Supreme Court. This petition was denied, 308 Ill. App. xv.

With regard to this case, the court say in the fourteenth paragraph of its opinion:

> "The case of *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, strongly relied upon, furnishes defendant little, if any, support. There the driver of the parked truck had run out of gas and was forced to leave his truck standing on the highway."

On the other hand the court indicates that the case of *Fitzpatrick* v. *C. & H. Sugar Ref. Corp., Ltd.*, 309 Ill. App. 215, and the case of *Bos* v. *Richards*, 71 Fed. (2d) 292, similar somewhat to the *Fitzpatrick* case on the facts, are controlling.

The court seem to have distinguished the *Cooney* case from the case at bar on the ground that the defendant's driver was forced to stop by reason of having run out of gas. But the reason for stopping, or whether there was no reason at all, could have no bearing on the question of the plaintiffs' contributory negligence. The facts in the *Cooney* case, we submit, are almost identical with those in the case at bar so far as the plaintiff's contributory negligence is concerned. In that case, as in the case at bar, the accident happened on a 4-lane highway; the defendant's truck was parked on the outer lane; the lights were burning on the rear of the defendant's truck; there was no traffic on the inner lane to interfere with the car approaching from the rear; there was no traffic approaching from the opposite direction; there were three clear traffic lanes to the left of the defendant's truck in which the plaintiff's intestate might have passed, had he been observant. About the only difference in the facts is that in the *Cooney* case the car driven by the plaintiff's intestate skidded a distance of 100 feet, instead of 75 feet, as the plaintiffs' evidence

shows to be the case in the case at bar. But, we respectfully submit, whether it skidded 100 feet or 75 feet is immaterial.

On the other hand, the facts in the *Fitzpatrick* case bear little, if any, resemblance to those in the case at bar. In that case the accident took place on a 2-lane highway and not a 4-lane highway, as in the case at bar. It was raining and the pavement was wet. In the case at bar the weather was clear and the pavement dry. In that case the plaintiff's husband and the defendant driver had been engaged in showing a moving picture. They left town at the same time. The car in which the plaintiff was riding was following that of the defendant at a distance of about 100 feet. This was known to the defendant's driver. Both cars had been driving some 40 to 45 miles per hour. The defendant's driver, without signalling, slowed down and stopped on the pavement. The plaintiff's husband was unable to stop or to turn to the left to avoid the defendant's car, due to the slipperiness of the pavement, and collided with its rear. In the *Bos* case the accident also occurred on a 2-lane highway. It was sleeting, raining and freezing. The lighting system on the defendant's truck failed. It was a disputed question of fact as to whether the defendant driver had placed flares in the road to warn of his presence and also whether or not he could have driven onto the shoulder. It is respectfully submitted that neither of these cases could be controlling of the decision in the case at bar. They bear little analogy, if any at all, either on the facts or on the pleadings.

The facts in the case at bar, we submit, are even stronger against the plaintiffs than those in the *Cooney* case since the plaintiffs' evidence shows not only that the driver of the car in which they were riding should have seen the truck in time to have avoided the acci-

dent, had he looked, but also that he was forewarned by the flares placed on the highway by the drivers of the trucks on the other side of the road that an accident had occurred and that traffic ahead of him could be expected to stop in order to render assistance.

The plaintiffs' theory of their cases is, as it was in the *Cooney* case, that the defendant, in stopping and parking its trucks on the highway, violated certain statutes, and that such supposed violations of the statutes was negligence on its part. We believe the evidence disproves any such contention, as we shall point out a little later on. Suffice it to say here that, even under their theory, if the trucks had not been stopped and parked, but had been moving at all, even slowly, there would have been no such supposed violation of these statutes. The plaintiffs' proof shows that at the time of the collision, even after having skidded on a dry pavement for a distance of 75 feet, the car was still traveling, according to their own estimates at a speed of 25 miles per hour (Tr. 144, 149), 15 to 18 miles per hour (Tr. 169), or 12 to 20 miles per hour (Tr. 234). If the trucks, therefore, had been traveling slowly, as they rightfully might have done, it is clear from the plaintiffs' testimony that the collision would have occurred nonetheless. It was, therefore, not the stopping and parking of the truck in question on the highway, even if that were negligence, which it was not, that caused the accident but, on the contrary, the negligence of the plaintiffs in failing to observe its presence there and in failing to turn to the left, where they had plenty of room, to avoid it. As was said in the case of *Geisen* v. *Luce*, 185 Minn. 479, at page 484:

> "The only charge of negligence against Ferris is that he permitted his car to stand on the pavement in violation of the statute. It is conceded that if he had been, at the time and place, driving his car

slowly he would not have been guilty of negligence. Under the circumstances, this accident would have happened just the same had the Ferris car been moving slowly. Indeed, had the Ferris car been moving it might have made the situation more dangerous. If the Ferris car while standing bore any relation to the accident, it was solely because of its being on the highway, not because it was a standing rather than a moving car. Its presence was known to all; it created no surprise; it did not obstruct a view of the traffic.

"It seems apparent that even if the standing had been such as to be a violation of the statute, it would not under such circumstances as here involved be the responsible cause, because the accident would not have occurred had it not been for Luce's negligence, which was an intervening, responsible cause, it not being a consequence of the 'standing.' In other words, upon the facts most favorably stated for the plaintiff, there was no causal connection between the 'standing' of the Ferris car and the accident; and without such causal connection there can be no recovery."

In the case of *Hogrefe* v. *Johnson,* 271 Ill. App. 469, the plaintiff drove his car into the rear of the defendant's car which was traveling at a speed of about 5 miles per hour, preparatory to leaving the pavement for the purpose of wiping the frost off his windshield. It was foggy, rainy, and freezing weather. The plaintiff's vision was interfered with by the frost on his windshield, but, according to his testimony, he was driving at a speed of 25 miles per hour. In reversing a judgment for the plaintiff, the court say, at page 473:

"The rights of persons operating automobiles upon public highways are equal and their duties towards one another are reciprocal; and persons operating automobiles upon the public highways, if in the exercise of ordinary care, should be on the alert for other cars upon the highway. Persons operating

automobiles are chargeable with notice that others are to be expected to be using such highway, and they owe a mutual duty to each other to exercise reasonable care to avoid collision.

"Whenever a person has contributed essentially to his own injury by his own negligence, the law will give him no redress. *Collins* v. *McMullin,* 225 Ill. App. 430. The question resolves itself into one as to whether or not the plaintiff's conduct was the proximate cause of his injury, and if so, his contributory negligence will bar his recovery.

"In *Harrison* v. *Binghcim,* 350 Ill. 269, with reference to duties of the plaintiff, it is stated: 'It was his duty to use reasonable care to have his automobile under such control as would enable him to avoid collision with other automobiles, whether parked along the curbing or traveling in the accustomed line of traffic.'

"A recovery in this case cannot be had or sustained unless it is affirmatively shown by the evidence that the plaintiff was in the exercise of due care for his own safety. The facts relative to the care exercised by him are not in dispute and they plainly indicate a disregard for his own safety. After carefully reviewing the present record, and considering all the facts and circumstances in evidence, we are of the opinion that the judgment appealed from cannot stand. We do not believe that the defendant is under any liability to the plaintiff. In our opinion, it clearly appears from the preponderance of the evidence that the damages suffered by the plaintiff were the result of and caused by his own negligence; and that his contributory negligence was the proximate cause of his injuries.

"He was aware of the weather conditions, the poor visibility, and the treacherous condition of the highway. Under such circumstances, it was his duty to keep a sufficient lookout ahead that would have enabled him to discover other vehicles upon the highway traveling in the same direction as himself, and to have operated his automobile in such

a manner as to either be able to stop the same, or to have passed the automobile in front of him in the usual and ordinary manner, the road then being clear."

In the *Hogrefe* case the opinion indicates that the plaintiff had one traffic lane clear of traffic in which to pass defendant's car to the left. In the case at bar the plaintiffs had three clear traffic lanes in which to pass, to make no mention of the shoulder.

In the case of *Johnson* v. *Kushler,* 269 Ill. App. 553, the plaintiff drove his automobile into the back of a tractor and trailer, alleged to have been standing on the highway. There was a dispute as to whether or not it was standing and whether there were lights burning on the back of the trailer. The plaintiff's car was being driven with the dim lights instead of the bright, and traveling at approximately 35 or 40 miles per hour. In reversing a judgment for the plaintiff, the court say, at page 561:

"We do not think that defendant is under any liability to plaintiff because, in our opinion, it appears from a clear preponderance of the evidence that the damages suffered by plaintiff were proximately caused by his own negligence and that of the young woman driving his car at the time as his agent and servant. (See *Hanusik* v. *Hanlon,* 258 Ill. App. 114, 119; *Johnson* v. *Newman,* 168 Ark. 836, 839, 840.) Each was guilty of contributory negligence in not keeping a sufficient lookout ahead that would have enabled them, had they been looking, to have discovered defendant's trailer and truck as they were approaching them, and to have checked or stopped the automobile in which they were riding in time to have avoided the collision. (See *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, 331, 332; *Phillips* v. *Davis,* 3 Fed. (2d) 798, 799; *James* v. *Motor Transit Management Co.,* 260 Ill. App. 246, 257.) Furthermore, it clearly appears under all the

> facts and circumstances in evidence in this case that the plaintiff was negligent in allowing his car to be driven on a dark, though clear, night, on a highway in a country district without having his bright headlights burning."

The Appellate Court reversed the case without remanding.

In *James* v. *Motor Transit Management Co.*, 260 Ill. App. 246, the plaintiff ran into the back of defendant's bus which had run out of gasoline and was left standing with the rear end protruding onto the highway. In reversing a judgment for the plaintiff the court say, at page 256:

> "It is clear that the manifest weight of the evidence shows that there were lights burning on this bus at the time of the accident. It is also clear that it shows that motor cars approaching it from either direction did discover the bus within distances of 30 yards to half a mile and in ample time to turn around it and pass it without a collision, and that the plaintiff by the exercise of ordinary care could have seen the bus in ample time to have avoided the collision. Under the circumstances shown in the evidence, it becomes immaterial just to what extent the rear end of the bus extended over the west side of the pavement or whether the tail light was in fact lighted. The main fact is established by the manifest weight of the evidence that the bus was visible to anyone approaching from either direction at a sufficient distance so that it could be seen by the use of ordinary care in ample time to avoid colliding with it."

In the case at bar the plaintiff Miller who was driving the car in question, testified that he was unable to estimate the distance between him and the truck when he first saw the truck (Tr. 277). Two of the plaintiffs, however, testified that they did see it, one of them when it was 65 to 75 feet away and the other when it was 40

to 50 feet away. What was visible to them must have been visible to the plaintiff Miller had he been observant. Had he seen the truck at either of these distances, he would have had ample time to avoid colliding with it, if it is a fact that the car was being driven at no greater speed than, according to the testimony of the plaintiffs, it was being driven.

In the case of *Collins* v. *McMullin,* 225 Ill. App. 430, the defendant's car ran into the back of the plaintiff's automobile, while the latter was stopped upon the highway. It was alleged that there was ample room for the defendant to have passed the plaintiff's automobile without colliding with it. A judgment for the plaintiff was reversed for errors committed on the trial, but in the course of its opinion, however, the court say, at page 433:

> "If the appellee's automobile was standing in the road under the circumstances recited in the additional count, that is to say, in plain view of the appellant and the appellant saw the car, or by the exercise of ordinary care and caution could have seen it in ample time to have turned aside without injuring it, as alleged in the additional count, and did not do so, the appellant would be guilty of actionable negligence."

Similar conclusions have been reached by the courts of other jurisdictions where the law is similar to that of Illinois. *Boylon* v. *Reliable Cartage Co.,* 258 Mich. 5 at 9; *Levine* v. *Bishop,* 292 Mass. 277 at 279; *Billingsley* v. *McCormick Transfer Co.,* 58 N. D. 920.

The case of *Cooney* v. *F. Landon Cartage Co.,* 308 Ill. App. 444, cited and quoted from above, was decided in February, 1941. The controlling facts in that case, as we have pointed out, do not differ materially from those in the case at bar. The holding in that case is in accord with a long line of decisions of the Illinois Courts in-

volving similar facts and is in accord with the decisions in other jurisdictions. In accordance with the law as laid down in these cases, the driver of an automobile who drives his car into the rear of another vehicle standing on the highway, even though it is illegally so standing, which we do not concede to be the case in the case at bar, is guilty of contributory negligence as a matter of law which bars his right to recover where, as here, in the exercise of ordinary care, he should have seen such vehicle and has an opportunity to avoid colliding with it.

While under the law of Illinois the negligence of the driver of an automobile cannot be imputed to the passengers, a passenger cannot excuse himself from the exercise of ordinary care simply because someone else is driving the car. There can be no question from the plaintiffs' proof that the presence of the defendant's truck on the highway should have been observed by all of the plaintiffs in ample time to have avoided it had they only looked. All, we submit, were guilty of contributory negligence in failing to keep a proper lookout, and the court erred in failing and refusing to direct a verdict for the defendant as to each of them.

Even if it could be contended that the passenger-plaintiffs were not equally as guilty as Miller in this regard, which we shall presently show could not, the plaintiff Miller, at least, was guilty of contributory negligence as a matter of law and the Circuit Court of Appeals was in error in affirming the judgment in his favor.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with the dim lights only, particularly when the bright lights were available.

The plaintiffs attempt to excuse their failure to avoid colliding with the standing truck on the ground that

they were unable to see it in time to stop or avoid it. Their proof, however, does not sustain any such contention, but, as we have pointed out above, on the contrary, shows that they could have seen it, had they merely been observant.

The evidence shows that the accident happened out in the open country and that there were no lights along the road. The plaintiffs admitted and their proof shows that they were driving with the "town" or "dim" lights. How far they were able to see along the highway with these lights does not appear from the evidence. Neither Miller, the driver of the car, or Foster, who was seated in the front seat with him, would even estimate the distance these lights lighted up the pavement ahead (Tr. 274, 226). Although they testified they had used these lights all the way out to the place of the accident, they had no opinoin at all as to how far objects were discernible ahead of them. There is no evidence of any traffic approaching them from the opposite direction, necessitating the use of the dimmer lights. The car was equipped with bright lights (Tr. 274), but they were never turned on (Tr. 275). The fact that they were driving with the dimmer lights, as well as the fact that they were approaching a place where other vehicles were in trouble, must have been as obvious to the other plaintiffs as it was to the driver. Ordinary prudence would dictate that under the circumstances the brighter lights should have been turned on to enable them to see what was ahead, or the speed of the car should have been checked sufficiently to enable it to be stopped in time to avoid objects within the range of their vision. Neither of these precautions were taken and in addition to this, Miller, the driver, testified that he had no idea at all what distance it would take him to stop at the speed at which he was driving (Tr. 277). The evidence does not show that any of the plaintiffs remonstrated, either

with regard to the lights or the speed at which the car was being driven, or that any of them did anything about it. The evidence is clear that there was no excuse for failing to make use of the bright lights and to have done so would have increased their range of vision and objects would have become discernible at a much greater distance. If, in fact, as the plaintiffs contend, they were unable to see the defendant's truck with the dimmer lights, it was negligence on their part to fail to make use of the bright lights.

The Circuit Court of Appeals in considering the fact that the plaintiffs were driving with the dimmer lights, says in the fifteenth paragraph of its opinion:

> "With the condition of the atmosphere, foggy, and hazy, as shown, at and near the point of the collision, it is purely a matter of speculation as to whether the bright lights would have been of assistance. There is room for the thought that they might have been harmful rather than helpful."

It is respectfully submitted, however, that the court has again lost sight of the fact that the burden was on the plaintiffs to produce proof which would take this question out of the realm of speculation. The brighter lights were available to them, but they were not used. It is common experience that one can see plainer and farther with the brighter lights. That is the purpose of such lights. If they could not see ahead, the exercise of ordinary care on their part required that they at least try the bright lights. Their proof is that they never tried them. They produced no proof whatsoever that the use of them would have been of no avail.

The situation was closely analogous to that in the case of *Scruggs* v. *Baltimore & O. R. Co.*, 287 Ill. App. 310, in which the plaintiff, a passenger in a car, being driven with the dimmer lights, was injured by the car colliding

with a box car at a railroad crossing. The court, in affirming a judgment rendered upon a verdict directed in favor of the defendant say, at page 315:

> "It is manifest that if the car had been burning the proper lights, as plaintiff knew it was not, and yet made no objection thereto, and had she been properly observant, she would have seen the box car in time to warn the driver and thus avoid the accident. It seems that the plaintiff, as stated in *Hardie* v. *Barrett, supra,* joined with the driver 'in testing manifest danger.' "

The facts in the case at bar are also closely analogous to those in the case of *Johnson* v. *Kushler,* 269 Ill. App. 553, in which the plaintiff's car, while being driven with the dimmer lights instead of the bright, collided with the rear end of a truck alleged to have been standing on the highway. In reversing a judgment for the plaintiff, with a finding that the plaintiff was guilty of contributory negligence, the court say, at page 561:

> "Furthermore, it clearly appears under all the facts and circumstances in evidence in this case that the plaintiff was negligent in allowing his car to be driven on a dark, though clear, night, on a highway in a country district without having his bright headlights burning. (*Johnson* v. *Gustafson,* 233 Ill. App. 216, 233; *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99, 102, 103.)"

In the case of *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, the plaintiff was injured when the car he was driving collided with a train at a railroad crossing. It was a foggy night and the plaintiff was driving with only his dim lights burning. The court, in affirming a judgment entered on a verdict directed for the defendant, after considering a large number of cases from this and other jurisdictions, say, at page 332:

> "These expressions and others of similar nature are applicable to the instant case. If the plaintiff

had his bright lights on, as the circumstances demanded and the law required (*Johnson* v. *Gustafson,* 233 Ill. App. 216), he would have seen the passing train in ample time to stop and avoid the accident."

In the case of *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99, the plaintiff was injured when the car in which she was riding collided with the rear end of a taxicab which had stopped for the purpose of repairing its lighting system. The car in which she was riding, although equipped with headlights, was being driven with only the cowl lights and a spotlight burning. In reversing a judgment for the plaintiff, the court say, at page 102:

"If the headlights had been lighted on the Sugru car, as required by statute, the Yellow Cab of appellant would have been visible to appellee and her husband a considerable distance further away than it was when only the parking lights and the spotlight were used. It is also probable that if the headlights had been lighted they could have seen the man who was trying to stop them, in time to have avoided the collision. It is undisputed that the passenger who was standing on the east side of the cab was yelling and waving his arms in an attempt to stop the Sugru car, but that it did not stop and crashed into the rear end of the cab.

"No reason is apparent why appellee did not know that the car in which she was riding was being driven without the headlights burning, or why she did not request her husband to turn on and use them. While it is true the negligence of her husband could not properly be imputed to her, still she was responsible for her own negligence if it contributed to her injury. Where the negligence of the person who receives the injury contributes to the injury, he cannot escape the consequences of his own carelessness. If the person riding in the vehicle knows that the driver is negligent and takes

> no precaution to guard against injury, he cannot recover, for, in such case the negligence is his own and not simply that of the driver. The plaintiff cannot lawfully omit to use care in blind dependence upon another, but must use care proportionate to the danger of which the facts convey knowledge. (*Flynn* v. *Chicago City R. Co.*, 250 Ill. 460.)"

The burden was on the plaintiffs to prove that they were in the exercise of ordinary care for their own safety. One of the essential elements in the exercise of ordinary care while riding in a car in the nighttime is to see that proper and sufficient lights are made use of to enable the driver to see objects ahead in time to avoid colliding with them. The burden was on the plaintiffs to prove this essential element of their exercise of ordinary care. They produced no such proof. On the contrary, their proof shows that the car was being driven with only the dimmer lights; that they had no idea how far these lights made objects discernible, and that the collision was due to their failure to see the defendant's truck. Under the circumstances in evidence, the failure on the part of the plaintiffs to make use of the bright lights instead of the dim was negligence on their part and such negligence was the proximate cause of their injuries.

3. If the "smoke," "fumes," "fog" or "smudge" from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

On the trial it was contended by the plaintiffs that the fusees set out by the truck drivers along the west side of the highway created a fog, smoke, red glow, smudge or haze that obscured their vision (Tr. 136, 147, 157, 175, 181, 203, 232, 247, 248, 273, 275). This contention, we submit, appears to be without merit since there was only some 6 or 8 fusees burning (Tr. 97).

Even if there had been twice as many, they were strung out for a distance of about 200 feet along the west side of the highway (Tr. 80-81) and it is quite unlikely that the trifling amount of smoke given off by this number of fusees over that distance could have obscured their vision to any considerable extent, if at all. However that may be, if there was any smoke or smudge or haze created by these fusees, it must have been perfectly obvious to the plaintiffs as they approached the place in question.

Nor are they in agreement at all as to the extent that their vision was obscured. The intensity of this fog or smoke or haze caused by the fusees seemed to increase as the trial progressed. The plaintiff Wagner testified that "it was foggy, smoke from these fusees and just a red glow in the whole neighborhood" (Tr. 136). The plaintiff Shoffner described it as "sort of a hazy or foggy red glow" (Tr. 157). The plaintiff Browne stated that the atmosphere and landscape was "a murky red" (Tr. 181). The plaintiff Foster stated "it was a sort of an Indian summer haze. That is, just a slight smoke, which was not thick enough to mar your vision, to obscure your vision" (Tr. 203). Foster changed his opinion on cross-examination and testified that it was practically invisible to see through the smoke (Tr. 232). By the time the plaintiff Miller took the stand, the smoke had gotten so thick that, according to his testimony, when he came to the place where this smoke obscured his vision he would not say that he could see as much as 10 feet ahead of his car (Tr. 274). Yet, according to the testimony of plaintiff Miller, without any idea of how fast he was traveling, without changing his lights in order to see better, and without any idea in what distance he would be able to stop (Tr. 275-277), he proceeded through the smoke.

While it would seem incredible that a few fusees such as truck drivers are required by the statute to carry in their trucks could give off such a volume of smoke as the testimony of the plaintiff Miller indicates obstructed his vision, we submit that, if it appeared to him to be as dense as he testified it was, it was negligence on his part, and of the other plaintiffs as well, under the circumstances shown by the evidence to proceed through it. The exercise of ordinary care on their part should have dictated that they stop until it blew away and the road cleared before proceeding.

The law is well settled that it is the duty of the driver of a vehicle to stop when his vision is obscured by a temporary obstruction, such as fog, or bright lights, or a smoke screen, when his failure to do so would jeopardize his own or the safety of others, and to remain at a standstill until such temporary obstruction has come to an end. *Johandes* v. *Chicago M. & St. P. R. Co.,* 260 Ill. App. 328, at 331-332; *Hazel* v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125 at 132; aff. 310 Ill. 38; *Ill. Cent. R. R. Co.* v. *Oswald,* 338 Ill. 270 at 275; *Dominick* v. *Haynes Bros.,* 13 La. App. 434 at 435; 127 So. 31; *Bong* v. *Webster,* 217 Ky. 781 at 786; 290 S. W. 662.

In the case of *Dominick* v. *Haynes Bros.,* 13 La. App. 434, the plaintiff and defendant were approaching each other upon a highway which was obscured by heavy smoke from burning grass on the roadside. Neither driver could see but a few feet ahead. The collision, however, occurred on the plaintiff's side of the road, the left wheel of the defendant's car being about 2 feet over the center of the road on the plaintiff's side. The court held both to be negligent and in sustaining a judgment for the defendant say, at page 435:

> "It was negligent for both drivers or either of them to enter the smoke screen that prevented them from seeing any appreciable distance ahead. It was

also negligence to drive at a rate of speed of 15 miles per hour after having entered the smoke.

"The facts of this case, including the width of the road and all, are very similar to the case of *Castille* v. *Richard,* 154 La. 274, 102 So. 398, 37 A. L. R. 586, in which the court held: 'Drivers of automobiles on narrow road approaching in opposite direction, who fail to stop until impenetrable cloud of dust raised by third automobile in passing one of them had subsided, held negligent.'

"The court in this case held both parties negligent and rejected their demands.

" 'It is the duty of the driver of an automobile to stop his car when his vision is entirely obscured by a temporary obstruction, such as a cloud of dust or smoke screen. When failure to do so would jeopardize the safety of others, then he must remain at a standstill until the obstruction has come to an end.' *Blashfield's Encyclopedia of Automobile Law,* Volume 1, page 370."

In accordance with the law as laid down in the foregoing decisions we respectfully submit that if the smoke from the fusees along the roadside did obscure the plaintiffs' vision, or even if they only believed it was obscured by such smoke, it was negligence on their part to proceed until such precautions were taken as would enable them to see objects ahead in time to avoid colliding with them and that, having failed to take such precautions, they are not entitled to recover.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

We believe we have sufficiently pointed out above that the evidence shows conclusively that the plaintiff Miller, the driver of the car in which the plaintiffs were riding, was guilty of negligence, as a matter of law, which caused or contributed to cause his injury and

that the court erred in affirming the judgment in his favor.

There remains the question whether the other plaintiffs, being passengers in the car driven by Miller, are also guilty of such negligence. The law is well settled in Illinois that it is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger, to avoid it and to warn the driver of such vehicle of such danger. *Dee* v. *City of Peru,* 343 Ill. 36 at 42; *Willgeroth* v. *Maddox,* 281 Ill. App. 480 at 485; *Opp* v. *Pryor,* 294 Ill. 538 at 547; *Pienta* v. *Chicago City Ry. Co.,* 284 Ill. 246 at 259.

In the case of *Dee* v. *City of Peru,* 343 Ill. 36, the plaintiff's intestate, Joseph Dee, was riding in an automobile driven by one Schuets. They had driven across the bridge at Peru at about 7:30 in the morning and about 9:00 o'clock were returning to Peru. When they returned the draw span of the bridge had been opened to make repairs and a gate or barrier was strung across the approach. Neither Dee nor Schuets noticed the barrier or that the draw span had been opened. Schuets drove the automobile up to and over the south portion of the bridge, through the barrier and into the river. Schuets succeeded in disengaging himself from the car, but Dee was drowned. His administrator brought an action for wrongful death against the City of Peru. In reversing a judgment for the plaintiff, and holding that the trial court erred in not instructing the jury to return a verdict for the defendant, the Court say at page 42:

> "One having an unobstructed view of a dangerous crossing on a highway is not justified in closing his eyes or failing to look in reliance upon the assumption that the highway is free and open to travel. The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the

> danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it. (Citing cases.) It is the duty of a passenger in a vehicle, where he has an opportunity to learn of danger and to avoid it, to warn the driver of such vehicle of approaching danger, and he has no right, because someone else is driving, to omit reasonable and prudent efforts on his part to avoid danger." (Citing cases.)

In the case of *Willgeroth* v. *Maddox,* 281 Ill. App. 480, Willgeroth and Maddox were riding in a car driven by Maddox at a speed of approximately 60 miles per hour, while approaching a railroad crossing. There was a freight train approaching the crossing at approximately 50 miles per hour. The speed of the car was maintained up until it was within 75 or 100 feet of the tracks. When the driver and the passenger first looked at the engine they were perhaps 15 feet from the crossing. Both were killed by the collision. The administratrix of the estate of Willgeroth brought action against the administratrix of the estate of Maddox. In reversing a judgment for the plaintiff, the court say at page 485:

> "That each of these parties was guilty of the grossest negligence in not discovering the approaching freight train is beyond question. From the evidence in this case we are of the opinion that Maddox and Willgeroth were guilty of negligence or wilful and wanton conduct of the same degree, as they both had equal opportunity to observe the approaching train."

That case was remanded to the trial court. Thereafter the trial court entered judgment for the defendant notwithstanding the verdict for the plaintiff. On a second appeal, this judgment was affirmed, 286 Ill. App. 622, and petition for leave to appeal was denied by the Supreme Court, 286 Ill. App. xlvii.

In the case at bar the plaintiff Foster was seated in the front seat beside the plaintiff Miller who was driving, as was the case in the *Dee* and *Willgeroth* cases quoted from above. He had as good an opportunity to observe danger ahead as did the plaintiff Miller. He was aware of the fact that the car was being driven with only the dim lights (Tr. 225) and was in a position to know of the supposed smoke on the highway as well as was the plaintiff Miller. We respectfully submit that the plaintiff Foster was in as good a position to know that they were approaching danger as was the plaintiff Miller within the holdings of the *Dee* and *Willgeroth* cases quoted from above, and that by reason of his failure to observe such danger and to warn Miller thereof he was equally guilty of negligence, as a matter of law, which was the proximate cause of his injury. The court was, therefore, in error in affirming the judgment in favor of the plaintiff Foster.

With regard to the other three plaintiffs, Wagner, Shoffner and Browne, the situation is somewhat, although not materially, different. They were occupying the back seat of the car. Ordinarily they would not have an equal opportunity with the driver of discovering danger. According to their testimony, however, they did observe the fusees burning along the west edge of the highway. They did observe the supposed smoke emitted by these flares, and they were in a position to know the kind of lights with which the car was being driven, and to observe its speed. Their observance of the flares must have indicated to them that there was trouble ahead and served as a warning to them that they should be on the alert to look out for danger. Their testimony, however, shows that they left this wholly to the driver. We respectfully submit that they, too, were guilty of negligence which was the proximate cause of their injuries and that they were not entitled to recover.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

The law of Illinois is so well settled as to need the citation of no authority, that a plaintiff, in order to recover, must not only prove that the defendant was negligent, but also that such negligence was the proximate cause of the occurrence by which he was injured. Even if it were conceded, which we submit is not the fact, that the defendant was negligent in stopping its trucks on the highway, such negligence, if any, was not the proximate cause of the occurrence complained of. The defendant's trucks were stopped on the outer or easternmost lane of the highway (Tr. 96). The highway was a 4-lane highway. It is obvious that if the plaintiff's car had been driven on the inner lane for northbound traffic, there would have been no collision. As we have pointed out above, there were three traffic lanes to the west of defendant's trucks in which the plaintiffs could have passed them had they been observant of the condition of the highway ahead. The fact of the defendant's trucks being stopped on the highway, therefore, whether negligently stopped or not, was not the proximate cause of the occurrence in question, but merely a condition by which the occurrence was made possible. It is well settled law that if the negligence of a party sought to be charged does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury.

In the case of *Briske* v. *Village of Burnham,* 308 Ill. App. 531, the plaintiff was injured when a car in which she was riding collided with a barricade built by certain railroad companies across what had formerly been En-

tre Avenue in the Village of Burnham. This street had been vacated and the land transferred to the railroad companies. The plaintiff brought action against the village and the railroads. The driver of the car testified that as he approached the barricade he was looking for trains along the switch track and did not see the barricade which was an additional 65 feet ahead. The court, in reversing a judgment for the plaintiff and entering judgment for the defendants and against the plaintiff for costs, say in the course of its opinion, at page 536:

> "Had the driver paid attention to his driving and observed the condition of the roadway in front of him, he would have stopped before striking the barricade. As stated in *Dee* v. *City of Peru,* 343 Ill. 36, 42, 'The law will not tolerate the absurdity of permitting one to testify that he looked and did not see the danger when the view was unobstructed and where, if he had properly exercised his sight, he would have seen it.' The presence of the barricade did no more than furnish a condition by which the injury was made possible. The proximate cause of the injury, however, was the negligence of the driver. For that reason, as a matter of law, none of the defendants is liable."

In the case of *Geisen* v. *Luce,* 185 Minn. 479, a car belonging to one Ferris came to a standstill on the right-hand side of the pavement. Plaintiff was riding with the defendant Luce as a guest when the latter approached the parked car traveling at 50 to 60 miles per hour. Luce swung to the left to go by the Ferris car and when abreast of it discovered a car coming in the other direction at a high rate of speed and to avoid a collision turned into the ditch, injuring the plaintiff. Plaintiff sued not only the driver, with whom he was riding, but the driver of the parked car, charging the latter with violation of a Minnesota statute identical with the statute of Illinois in regard to parking on the paved portion

of the highway. In entering a judgment for Ferris, notwithstanding the verdict, the court say, at page 484:

> "The only charge of negligence against Ferris is that he permitted his car to stand on the pavement in violation of the statute. * * * If the Ferris car while standing bore any relation to the accident, it was solely because of its being on the highway, not because it was a standing rather than a moving car. * * *"
>
> "It seems apparent that even if the standing had been such as to be a violation of a statute, it would not under such circumstances as here involved be the responsible cause, because the accident would not have occurred had it not been for Luce's negligence, which was an intervening responsible cause, it not being a consequence of the 'standing.' In other words, upon the facts most favorably stated for plaintiff, there was no causal connection between the 'standing' of the Ferris car and the accident; and without such causal connection there can be no recovery.
>
> "* * * Even though the standing of the car on the highway may be unlawful, yet the wrongful standing cannot be the proximate cause of an accident unless it results from the standing. While such standing may be the occasion or condition, it is not in a legal sense a contributing proximate cause of the accident. (Citing cases.) The 'standing' of the Ferris car did not set Luce's negligence in operation, nor concur therein. The accident resulted from Luce's excessive speed, his indiscretion in not having his car under control in anticipation of southbound traffic, and his failure to appreciate the impending danger. This conduct on his part constituted negligence, which was the proximate cause of the accident."

The reasoning in this case is applicable to the facts in the case at bar. It was not the standing of the defendant's truck on the highway that caused the accident. The accident would have happened regardless of

whether it was standing or moving. The proximate cause of the occurrence was the negligence on the part of the plaintiffs in failing to observe it and to turn to the left where there was plenty of room to pass it.

In the case of *Jaggers* v. *Southeastern Greyhound Lines,* 34 F. Supp. 667, the court had under consideration a case involving facts very similar to those in the case at bar. In that case the defendant's bus stopped to discharge passengers with the rear end protruding onto the highway, in violation of a statute of the State of Tennessee. The accident happened in the nighttime, the lights were burning on the rear of the bus, and there was plenty of room to pass to its left. There was no traffic from the opposite direction. The court held that the defendant bus company had violated the statute in question, but directed a verdict in its favor, saying in the course of its opinion, at page 669:

> "Having the situation thus in mind, it is to be remembered that the arbitrary terms of the statute are violated only when the vehicle is standing. If the vehicle is moving, no matter how slowly, the statute is not violated. Then would it be reasonable to say because the vehicle was standing, under these conditions, the standing of the vehicle was the proximate cause of the collision? Would not the collision have occurred had the vehicle been moving slowly?
>
> "If this be the situation, then the standing of the vehicle was not a necessary cause of the collision, and would be a remote cause, the proximate cause being the negligence of the driver of the Lefwich car running into the rear end of the plainly lighted bus with ample room to pass on the left.
>
> "* * * There appears to be no reason why Lefwich could not have seen this bus in ample time to avoid striking it and passing to the left where there was full room. He could have done that if he had exercised ordinary care, notwithstanding the bus driver had violated the statute."

In the case of *Gilbert* v. *Goralnik,* 238 Ill. App. 199, the plaintiff brought his car to a stop on the north side of the bridge crossing the river at St. Louis. The plaintiff, who was driving in the same direction, was run into by another car which struck the hub of the left front wheel, causing it to turn suddenly to the right and collide with the car of the defendant. In reversing a judgment for the plaintiff, the court say at page 203:

> "If the negligence does nothing more than furnish a condition by which the injury is made possible, and that condition causes an injury by the subsequent independent act of a third person, the creation of the condition is not the proximate cause of the injury. * * *
>
> "We are of the opinion and hold that the striking of the appellee's car by the driver of the said Hudson car was an independent cause bringing about said collision, which had no logical connection with the stopping by the appellant of his car at the place in question, and that the trial court should have directed a verdict for appellant, and the failure to do so was error."

Munsen v. *Ill. Northern Utilities Co.,* 258 Ill. App. 438, was an action to recover amounts paid as compensation to an employe under the Workmen's Compensation Act by reason of injury sustained by the employe when an iron rod in the hands of the employe came into contact with the defendant's transmission wires. An order had been entered on the defendant by the Illinois State Highway Department to raise the wires to 22 feet above the floor of the bridge on which the employe was working. They had been raised to only 13 feet above the floor and it was practically conceded that the defendant was negligent in failing to so elevate the wires. In sustaining a judgment for the defendant, the court say, at page 443:

> "It is also fundamental that if the negligence of the party sought to be charged does nothing more than furnish a condition by which the injury is

made possible, and that condition causes an injury by the subsequent, independent act of a third person, the creation of the condition is not the proximate cause of the injury."

And again, in discussing the question of proximate cause, at page 444:

"So far as the record discloses, the construction of said bridge was in no way interfered with or hindered by reason of the fact that said transmission wires had not been elevated as required by the State Highway Department. There was no causal connection between the placing of said shacks in repair and the height of said wires. Burroughs was ordered by his foreman to go to said bridge and get a rod to be used in making stable said stove pipe. That in doing so, he should place said rod in contact with said wires, would be improbable. We, therefore, hold that, under the authorities above cited, the evidence fails to support the second proposition."

In the case of *James* v. *Motor Transit Management Co.,* 260 Ill. App. 246, the plaintiff was injured when the car in which she was riding came into collision with a motor bus, the rear end of which was left standing on the paved portion of the highway. The court concluded that the standing of the bus on the highway was not the proximate cause of the injuries, quoting at length from the case of *Powers* v. *Standard Oil Co.,* 98 N. J. L. 730.

In railroad cases involving collision between automobiles on the highway and railroad cars standing across the highway, it has been universally held that the presence of the railroad cars upon the highway is not the proximate cause of the accident but a mere condition or incident. While railroad cases may not be compelling authority upon the question of reciprocal duties owed by motorists upon the highway, they are obviously directly in point on this issue of proximate cause.

Thus in *Gilman* v. *Central Vermont Railway,* 93 Vermont 340, it was held that the action of a railroad in obstructing a crossing for an unlawful length of time in violation of a statute, was merely a condition and not the proximate cause of an injury resulting from a collision with the car. This case was cited with approval in *Coleman* v. *Chicago, B. & Q. Railroad Co.,* 287 Ill. App. 483. See also *Probert* v. *Chicago, I. & L. Ry. Co.,* 93 Fed. (2d) 259 at 261, and *Orton* v. *Penn. R. Co.,* 7 Fed. (2d), 36 to 38.

In accordance with the law as laid down in the above cases cited and quoted from, negligence, if any there was, on the part of the defendant in stopping and parking its trucks upon the highway, merely created a condition by which the occurrence in question was made possible and was not the proximate cause thereof. The proximate cause of the collision and the resulting injuries to the plaintiffs was the subsequent and independent negligence of the driver of the car in which they were riding in failing to observe the presence of the truck and in failing to avoid colliding with it.

6. The proximate cause of the occurrence complained of was the negligence of the driver of the car in which the plaintiffs were riding and the plaintiffs are not entitled to recover.

We believe we have sufficiently pointed out above that under the law of Illinois the plaintiff Miller was guilty of negligence, as a matter of law, which was the proximate cause of his injuries and that the court was in error in affirming the judgment of the trial court in his favor.

We believe we have also sufficiently pointed out that under the law of Illinois the plaintiff Foster, who was seated in the front seat of the car, and had an equal opportunity to observe the manner in which the car was

being driven and objects ahead, was, as a matter of law, equally guilty of negligence which was the proximate cause of his injuries.

We believe, also, that we have sufficiently pointed out that under the law of Illinois the other plaintiffs, Wagner, Shoffner and Browne, although seated in the rear seat of the car, had sufficient opportunity to observe the manner in which the car was being driven and to observe the truck in question, were also guilty of negligence which was the proximate cause of their injuries. However that may be, as we have pointed out above, the fact that the defendant's truck was standing on the highway, was merely a condition which made the occurrence possible and the negligence, if any there was, of the defendant in causing it to be stopped was not the proximate cause of their injuries. The proximate cause of their injuries was the negligence of the plaintiff Miller in driving the car in which they were riding into collision wth the truck.

This is pointed out very lucidly in the case of *Roanoke Ry. & Elec. Co.* v. *Whitner,* 193 Va. 253. In that case the plaintiff was riding as a guest in a Packard coupe owned and driven by one Chapman. The coupe ran into the back end of a bus owned and operated by the defendant while it was stopped on the paved highway in violation of a statute of the State of Virginia. The pavement was a marked 3-lane highway. The Court in reversing a judgment for the plaintiff and entering judgment for the defendant, say at page 260:

> "The primary negligence of the defendant was broken by the independent, efficient and wrongful intervening negligence of Chapman. The primary negligence of the defendant had ceased to operate. The intervening negligence of Chapman was responsible for all that thereafter occurred."

To the same effect see *Jaggers* v. *Southern Greyhound Line,* 34 Fed. Supp. 667 and 669; *Geisen* v. *Luce,* 185 Minn. 479 at 484.

It, therefore, follows that even if it could be held that the plaintiffs, Foster, Wagner, Shoffner and Browne, being passengers in the car driven by the plaintiff Miller, were not guilty of any negligence which contributed to cause their injuries, the verdicts in their favor were contrary to law, since the proximate cause of their injuries was the negligence of the plaintiff Miller, and not any negligence on the part of the defendant. The Court was, therefore, in error in affirming the judgments of the trial Court.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

The charges laid in the plaintiffs' complaints are identical and will be found in paragraph 9 thereof (Tr. 4, 25 and 42). There are eight separate charges of negligence set up in separate paragraphs; five of these charges allege violation of certain sections of the Motor Vehicle Act. Three of these five charge violation of sections of the Motor Vehicle Act which have no application within the corporate limits of cities, villages and incorporated towns.

We would call the court's attention here, also, to the fact that it is alleged in paragraph 3 of the complaints that the accident in question occurred at a point on Skokie Highway approximately one-half mile north of where Skokie Highway is intersected by Willow Road, and in paragraph 4 that such point is outside the limits of any city, village or incorporated town. We would call

the court's attention, also, to the fact that the plaintiffs' proof shows that the occurrence took place about a mile and three-eighths north of the intersection of Skokie Highway and Willow Road and within the corporate limits of the Village of Glencoe. These facts will also be considered under Point V of the defendant's argument.

We wish to point out here that the plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints. Not only is this true, but, on the other hand, the plaintiffs' evidence tends to disprove most of these charges.

In the thirteenth paragraph of its opinion the Circuit Court of Appeals, in considering the charges laid in the complaints, say:

> "Furthermore, the complaints contained numerous charges of general negligence."

It is respectfully submitted that the court is in error in this statement. An examination of the charges laid in these complaints will show that the remaining three charges are charges of specific negligence.

We shall proceed to consider separately the charges laid in these complaints.

1. As to the charges laid in sub-paragraph 9 (a).

In this sub-paragraph it is charged that the defendant:

> "Carelessly and negligently stopped and parked said motor truck at a place where it was known, or by the exercise of reasonable care could or should have been known, it was dangerous to other northbound vehicles on said highway, in that it was known or could or should have been known that the red truck so blended into the red glow of the landscape and was so obscured by smoke, and fumes and gases as not to be discernible by persons traveling in a northerly direction until it was too late to prevent a collision."

The plaintiffs produced no evidence which tends to prove the charges laid in this paragraph. Their evidence goes no further than proof that the truck in question was red. There is no proof that it blended into the "red glow of the landscape" or that it "was so obscured by smoke and fumes and gases as not to be discernible." It cannot be inferred from the fact that the truck was red that it blended with the lights produced by the fusees. There was no proof that it was the same shade of red as was the light. The occurrence took place at night and the logical inference, if not the only inference, to be drawn from the proof is that the truck in question was much more clearly visible by reason of the light from the fusees than it would have been had there been no such light. At least such inference should be indulged until proof to the contrary appears. There was no such proof. The burden of producing such proof was on the plaintiffs.

Furthermore, there was no proof that the truck was so obscured by smoke and fumes and gases as not to be discernible. The plaintiffs' proof was to the effect that they had passed through the supposed smoke some distance before their car came into contact with the truck. Their proof fails to show that there was any smoke around the truck.

Nor did the plaintiffs prove that there was any smoke on the highway at the time the defendant's truck came to a stop. Their proof was that the smoke from the west side of the highway was blown over onto the east side into the lane in which they were traveling. So far as their proof goes, if such was the fact, it was most likely blown over after the defendant's truck had stopped, a circumstance over which the defendant had no control, and which their evidence does not show the defendant should have anticipated.

The proof also shows, as we have pointed out above, that the fusees from which this supposed smoke came were strung along the west side of the highway for a distance of at least 200 feet. According to the plaintiffs' proof this was as obvious to them as it could have been to the defendant. In fact, the proof shows that the plaintiffs were the only witnesses by whom the supposed smoke was observable at all, and they were in wide disagreement as to its density and the extent their vision was obscured by it. If the vision of anyone was obscured by the smoke, it was the vision of the plaintiffs, and that before they drove into it. They were in a position to see it. Yet, observing its presence, they negligently proceeded to drive through it without any regard to the fact that they were unable to see whether the highway ahead was clear.

Nor did they produce any proof that the defendant knew, or in the exercise of ordinary care should have known, that the lighting of a few fusees along the opposite side of the road would produce sufficient smoke or fumes or gases to obscure a vehicle standing on the highway. If such type of fusee was, in fact, used, the fusees were not lighted by the defendant, and the negligence in using such type of fusee and in producing the smoke, if they did, was that of the drivers on the west side of the road and not of the defendant. Neither the producing of the smoke, nor it blowing over onto the east side of the road was within the control of the defendant or to be anticipated by it.

We submit that the plaintiffs failed to produce any evidence tending to prove the charges laid in sub-paragraph (a) of paragraph 9 of the plaintiffs' complaints.

2. As to the charges laid in sub-paragraph 9 (b).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently stopped and parked said motor truck under the circumstances as herein set forth, without having any tail light or other illumination burning upon the rear of said motor truck and without in any way indicating its presence on said highway and without giving warning to any person approaching the same, of its presence thereof."

The plaintiffs' evidence, we submit, disproves the charges laid in this sub-paragraph. Their proof shows that at the time the defendant's truck stopped on the highway the lights on the truck were burning (Tr. 80, 88). Such being the case, there was no duty on the part of the defendant to give any further warning than was given by the lights on the truck. *Miller* v. *Erickson,* 76 Fed. (2d) 598 at 599.

But the plaintiffs' evidence shows that a further warning was given. The plaintiff Foster testified that he saw a light on the right-hand side of the pavement ahead of them flashing from left to right (Tr. 205) 60 to 75 feet ahead (Tr. 207) and that he called Miller's attention to it (Tr. 237). The plaintiffs' proof, therefore, disproves the charges laid in this sub-paragraph.

3. As to the charges laid in sub-paragraph 9 (c).

In this sub-paragraph it is charged that the defendant:

> "Carelessly and negligently failed to have said truck equipped with and to keep in operation at said time and place, three red lights on the rear of said truck, plainly visible at a distance of at least 500 feet in violation of Section 104 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat. 1941, Chap. 95½, par. 201) provides as follows:

> "(a) Every motor vehicle of the second division as described in Article I of this act, the length of which, together with any trailer or trailers in tow thereof, is more than 25 feet and the width of which is more than 80 inches, while being operated on the highways of this state outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, shall display on the front thereof a horizontal line near the top of the vehicle, approximately 6 inches apart, three green lights plainly visible at a distance of at least 500 feet; also on the rear thereon in a horizontal line approximately 6 inches apart, three red lights plainly visible at a distance of at least 500 feet; also on the front of the body of said vehicle near the lower left hand corner one yellow or amber tinted reflector; also on the rear of the body of said vehicle, not more than 12 inches from the lower left hand corner, one red reflector. All motor vehicles of the second division more than 20 feet long and all trailers and semi-trailers, while being operated on the highways of this state outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, shall display on each side of the vehicle at approximately the one-third point of the length of the same, at a height not exceeding five feet above the surface of the road, and reflecting on five feet above the surface of the road, and reflecting on a line approximately at right angles to the center line of the vehicle two amber tinted reflectors of a type approved by the Secretary of State. Providing, however, that on motor vehicles equipped with acetylene headlights, approved reflectors, conforming as to color and location, may be used in lieu of the three green lights and three red lights required under this section."

It will be noted that this section of the statute applies only when such vehicle is traveling on the highway

"outside the limits of cities, villages and incorporated towns."

The plaintiffs, however, failed to produce any evidence tending to prove that the defendant violated this statute in any respect. Such proof as the plaintiffs produced tends to disprove any such violation. Their evidence shows that the lights were burning on the defendant's truck (Tr. 80, 88), and that after the occurrence in question the truck with which the plaintiffs' car collided was equipped with such lights (Tr. 122). They produced no evidence that these lights did not comply with the requirements of the statute, either as to number or distance at which they were visible. Their own testimony was limited to the mere fact that before collision they did not see them.

4. As to the charges laid in sub-paragraph 9 (d).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently failed to have said truck equipped with and to keep in operation at said time and place at least one lighted lamp so as to throw a red light visible for at least 500 feet in the reverse direction, in violation of Section 103 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 200) is the familiar "tail light" statute. What we have pointed out above with reference to lights is applicable here. The plaintiffs proved that the defendant's truck was equipped with such taillight and that it worked (Tr. 122). They produced no proof that it was not working at the time of the occurrence. They did prove that the lights were burning on the defendant's truck As was said before, their own testimony was limited to the fact that they did not see it.

5. As to the charges laid in sub-paragraph 9 (e).

In this sub-paragraph the plaintiffs charge that the defendant:

> "Carelessly and negligently failed to provide or maintain a lookout for other northbound traffic lawfully and properly upon the highway."

The plaintiffs' proof shows that the defendant's trucks had stopped some little time before the car in which they were riding arrived at the scene of the occurrence. This is not, therefore, a case where the defendant made a sudden stop in front of traffic traveling closely in the rear. The occurrence was not caused by the stopping of the truck. It was, therefore, not caused by any failure on the part of the defendant to keep a "lookout" for other northbound traffic. If this charge was made on the assumption that it was the duty of the defendant to give to traffic approaching from the rear other warning in addition to the lights which were burning on the truck, such assumption is without foundation.

The highway where the trucks were stopped was straight and level for quite some distance in both directions. There was no hill or bend in the road to obscure their position. There was no necessity disclosed by the plaintiffs' proof of giving any additional warning. There was no negligence on the part of the defendant in failing, if it did fail, to give such warning.

In the case of *Miller* v. *Erickson,* 76 Fed. (2d) 598, the court considered this question. In that case the plaintiff was riding as a guest in an automobile driven by the defendant Erickson at a speed of at least 25 miles an hour in a snowstorm which limited the driver's visibility to 60 or 70 feet. The automobile in which he was riding collided with an automobile belonging to the defendant Wood, which was standing on the right-hand side of the

highway with its taillight burning. Wood's car was stuck and he was waiting for someone to give him a push in order to start his engine. It was contended that Wood should have had someone posted to the rear to warn approaching traffic. The court, in affirming a judgment for the plaintiff against Erickson, but reversing the judgment as to Wood, say, at page 599:

> "It seems to us extravagant to say that during the interval someone ought to have been sent back to flag approaching cars. Why should Wood have foreseen that Erickson would come along on such a night at such a speed? *Seibert* v. *Goldstein Co.*, 99 N. J. L. 200, 122 A. 821, cited as justifying such a result, does not do so. The recovery really rested upon the violation of a traffic law which required a tail light; and although the opinion does suggest that the driver should have sent back his assistant to give warning that was not necessary to the result. We think that a verdict should have been directed for the defendant Wood."

Although there was no duty on the part of the defendant to give any additional warning under the law as laid down in that case, the plaintiffs' proof shows that the defendant did take this additional precaution and that one of the plaintiffs, Foster, did see the flashlight ahead at a distance of 60 to 75 feet (Tr. 207), a distance which would have given the driver of their car, had he been observant, ample opportunity to turn to the left and avoid the collision, had the car, as the plaintiffs contend, been traveling at a speed of only 30 to 35 miles per hour. We respectfully submit that the plaintiffs failed to prove this charge and that their evidence disproves it.

6. As to the charges laid in sub-paragraphs 9 (f) and 9 (g).

These sub-paragraphs both charge a violation of the same section of the statute and will be considered to-

gether. By these sub-paragraphs the plaintiffs charge that the defendant:

> "(f) Carelessly and negligently stopped and parked said motor vehicle upon the paved or improved or main traveled part of said highway when it was then and there practical to stop, park or remove said vehicle off said part of the highway, in violation of section 88 of the Uniform Act regulating traffic on highways.
>
> "(g) Carelessly and negligently stopped and parked said motor vehicle upon the paved portion of said highway at the time and place aforesaid, without so parking the same that a clear view of such stopped vehicle would be available for a distance of 200 feet in each direction upon said highway, in violation of Section 88 of the Uniform Act regulating traffic on highways."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 185) provides as follows:

> "(a) Upon any highway outside of a business, residence or suburban district, no person shall stop, park or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available for a distance of 200 feet in each direction upon such highway."

It will be noted that this section of the statute applies only when such vehicle is "upon any highway outside a business, residence or suburban district."

In considering this statute the Circuit Court of Appeals say in the ninth paragraph of its opinion:

"There is some dispute as to whether section 88 is limited to highways outside of the incorporated limits of a city or village."

It is respectfully submitted that there could be no *bona fide* dispute about this. It is purely a question of law and the statute is clear. Section 16(b) of the same Act defines a "suburban district" as: "that portion of a city, village or incorporated town other than the closely built up business and residence district." It follows that Section 88 is limited to highways outside incorporated limits of a city or village.

The plaintiffs' proof, we submit, disproves the charges laid in both of these sub-paragraphs. As to the charges laid in sub-paragraph (f) the proof showed that the defendant's trucks were large, heavy trucks. Their proof showed also that a truck similar in size to that of the defendant's truck had pulled off the pavement on the left side of the highway and had sunk down to such an extent that it was unable to get back onto the highway. The occurrence took place the first part of April when the shoulder along the pavement can be expected to be soft. The proof showed that such was the case. It was, therefore, not "practical" to drive these vehicles off the paved highway, and there was, therefore, no violation of the statute in this respect.

The plaintiffs' proof, we submit, disproves any violation of this section of the statute by the defendant.

7. As to the charges laid in sub-paragraph 9 (h).

In this sub-paragraph the plaintiffs charge that the defendant:

"Carelessly and negligently stopped and parked the said motor vehicle on the paved portion of said highway without displaying any flares or lanterns or other signals visible at 100 feet to the rear of

said motor truck contrary to the provisions of Section 121 of the Uniform Act regulating traffic of the State of Illinois."

This section of the statute (Ill. Rev. Stat., 1941, Chap. 95½, par. 218) provides as follows:

"(a) No person shall operate any motor vehicle of the second division upon a highway outside of a business or residence district at any time from sunset to sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than 3, or electric lanterns or other signals capable of continuously producing three warning lights, each visible from a distance of at least 500 feet for a period of at least 12 hours, except that a motor vehicle transporting flammable liquid may carry red reflectors having a minimum diameter of 6 inches in place of the other signals above mentioned.

(b) Whenever any motor vehicle of the second division and its lighting equipment are disabled during the period when lighted lamps must be displayed on vehicles and such motor vehicle cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other persons in charge of such vehicle shall cause such flares, lanterns or other signals to be lighted and placed upon the highway, one at a distance of approximately 100 feet in advance of such vehicle, one at a distance of approximately 100 feet to the rear of the vehicle, and the third upon the roadway side of the vehicle, except that if the vehicle is transporting flammables three reflectors may be so placed in lieu of such other signals and no open burning flares shall be placed adjacent to such last mentioned vehicle."

There is an additional paragraph of this statute which applies to transporting explosives, but there was no proof that the defendant was transporting such.

The Circuit Court of Appeals seems to lay great stress on the applicability of this section of the statute to the

plaintiffs' evidence in the ninth and thirteenth paragraphs of its opinion. It is respectfully submitted that the Circuit Court of Appeals was in error in this regard and that the plaintiffs failed to produce any proof whatsoever of any violation of this section of the statute on the part of the defendant.

It will be noted that paragraph (b) of this statute merely requires that a person operating such a motor vehicle is required to carry therewith a certain number of flares, lanterns or other signal devices. The plaintiffs produced no proof that the defendant's trucks were not equipped with such. Even if they had not been so equipped, such failure on the part of the defendant could not have been the proximate cause of the occurrence complained of.

It will also be noted that paragraph (b) applies only when a motor vehicle of the second division *"and its lighting equipment are disabled."* There was no proof nor even the slightest contention that the defendant's truck or its lighting equipment was disabled at the time of the occurrence. Consequently, there was no violation of this statute and no duty on the part of the defendant to display any flares or lanterns or other signals, as required by this sub-paragraph of the statute. The plaintiffs' proof showed conclusively that this section of the statute and the alleged violation thereof were not involved at all in the occurrence complained of.

The court was apparently confused as to the applicability of this section of the statute and had in mind Section 41(d) of the old Motor Vehicle Act of Illinois (Ill. Rev. Stats., 1935, Chap. 95-a, par. 42(4)). That statute required a commercial motor vehicle stopping upon any traveled portion of a highway outside the territorial limits of a city, village or town, upon certain conditions, to immediately give warning thereof by displaying and burning a railroad fusee type of flare or

other portable light in the immediate vicinity of such stopped vehicle, etc. This section of the old Motor Vehicle Act, however, was repealed by the passage of the Uniform Act Regulating Traffic upon the Highways in 1935 (Ill. Rev. Stats., 1941, Chap. 95½, par. 98, *et seq.*), and is no longer the law. Under the Uniform Act the lighting of trucks upon the highway is now prescribed by the statute, furnishes a sufficient warning to other vehicles upon the highway and the displaying of flares or other lights is no longer required, except in case a vehicle *and its lighting system* should become disabled, as provided in Section 121 of the Act. The effect of the repeal of Section 41(d) of the old Motor Vehicle Act is discussed in the case of *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, to which the court has already been referred. It is respectfully submitted that Section 121 of the Uniform Act Regulating Traffic on the Highways has no application to the plaintiffs' proof and that the plaintiffs failed to prove any violation of this section of the statute.

It is elementary that if the plaintiff is entitled to recover at all, he must recover on the proof of the charges laid in his complaint. Proof of acts of negligence, if any, other than those charged in the complaint, do not permit a recovery. In the case at bar the plaintiffs not only failed to prove any of the charges laid in their complaints, but as to the greater number of these charges the plaintiffs' evidence disproves them. The trial court was in error in denying the defendant's motion for directed verdicts and its further motion for judgment notwithstanding the verdicts. It was, therefore, error on the part of the Circuit Court of Appeals to affirm the judgment of the trial court.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

It was alleged in the plaintiffs' complaints that the occurrence complained of happened at a point on Skokie Highway approximately one-half mile north of where Skokie Highway is intersected by Willow Road, and in paragraph 4 of the complaints that this point on the highway is outside the limits of any city, village or incorporated town (Tr. 3, 24, 42). The allegation of the complaints that the accident happened outside the limits of any city, village or incorporated town is a material allegation in that sections 104 and 88 of the Uniform Act Regulating Traffic on Highways (Ill. Rev. Stat. 1941, pars. 201 and 185) have no application unless such was the fact. The proof shows that the place of the occurrence complained of was not approximately one-half mile north of Willow Road, but at a point about one and three-eighths miles north thereof, north of Tower Road and opposite the water tower (Tr. 71, 81, 103, 115, 126, 221-223) and within the corporate limits of the Village of Glencoe (Tr. 309).

When it appeared from the proof that the accident did not happen outside the limits of a city, village or incorporated town, as alleged, but did, in fact, occur within the corporate limits of the Village of Glencoe, the defendant called the court's attention to this fact and moved for leave to file an amendment to its answer, setting up such fact in order to conform to the proof (Tr. 371-373). Upon objection of counsel, the court overruled the defendant's motion and refused to permit it to file its amendment (Tr. 373). Although there was no dispute in the evidence that the occurrence took place

within the corporate limits of the Village of Glencoe, counsel for the plaintiffs refused to amend the complaints to state the truth, or to dismiss the charges, laid therein, predicated on these alleged violation of these statutes. The defendant moved the court for directed verdicts on the ground of this variance (Tr. 460), but the motion was overruled (Tr. 463). The complaints were never amended to speak the truth.

The trial court was in error in refusing to permit the defendant to amend its answers. Civil Practice Act, Illinois, Sec. 46 (3), Ill. Rev. Stat., 1941, Chap. 110, par. 170; and Rules of Civil Procedure for the District Court, Rule 15. But the error of the trial court did not cure the variance between the allegations of the complaints and the plaintiffs' proof.

In considering this variance, the Circuit Court of Appeals in the tenth paragraph of its opinion say:

> "When defendant admitted by its pleadings that the collision occurred outside of the incorporated limits of Glencoe, there was no burden upon the plaintiffs to make such proof, and, as stated, there is nothing in the record which would justify a contrary holding."

It is respectfully submitted that the Circuit Court of Appeals is in error in this statement. While it may be true that a fact admitted by the pleadings is not required to be proved, that is not the situation here. Having alleged a state of facts, which, if proven, would have made out a cause of action, they proved that such state of facts were untrue,—that they had no cause of action under these charges of their complaints. Recovery cannot be had upon proof of a state of facts under which no liability exists.

In considering the map in evidence (Tr. 309), the Circuit Court of Appeals say, also, in the tenth paragraph of its opinion:

> "It is true this map is in evidence, but it is also true that the court instructed the jury, at plaintiffs' request, to disregard any reference on the map to the Village of Glencoe and any designation as to incorporated and unincorporated territory. This motion was allowed for the reason that the court considered the map unreliable."

It is true that the trial court did instruct the jury to disregard the references on the map to the Village of Glencoe, but it is respectfully submitted that the Circuit Court of Appeals is in error in stating that the motion was allowed for the reason that the court considered the map unreliable. The record shows (Tr. 320) that the motion of counsel for the plaintiffs to strike the map on the grounds that it was unreliable was overruled and that the court instructed the jury to disregard any references on the map to the Village of Glencoe for the reason stated by counsel for the plaintiffs (Tr. 308) that "it is in direct violation of the pleadings introduced by the defendant in this case as to the question of incorporation of the territory involved." But instructing the jury to disregard the map for these reasons did not cure the variance between the plaintiffs' proof and the allegations of their complaints. They did not stand on the allegations of their complaints, but, on the contrary, proved the allegations to be untrue, that the occurrence did not take place outside the limits of an incorporated village, or at the place alleged in their complaints.

The law is well settled that a plaintiff cannot recover on an alleged state of facts where there is a material variance between the proof adduced and the facts alleged.

In the case of *Brodsky* v. *Frank,* 342 Ill. 110, the court say at page 116:

> "At the close of the evidence these variances were called to the attention of the court and a motion was

made to direct a verdict, which motion was overruled. A plaintiff must prove the case alleged in his declaration. He can recover only on the allegations of the declaration and not on a case not alleged, even though such a case is established by the evidence. A defendant has a right to know what the charges are in order to properly make a defense and to prevent his being taken by surprise by evidence on the trial. (*Feder* v. *Midland Casualty Co.*, 316 Ill. 552.) The question of a variance was properly raised in the trial court and the motion to direct a verdict should have been sustained."

In the case of *Buckley* v. *Mandel Bros.*, 333 Ill. 368 it was alleged in the plaintiff's complaint that the defendant's truck struck the plaintiff. The proof showed that the plaintiff, who was riding a motorcycle, ran into and struck the truck. The court, in reversing a judgment for the plaintiff without remandment, say at page 373:

"When the plaintiff sets out in his declaration the negligent acts of the defendant relied on as a basis for a recovery, he must establish those negligent acts, and cannot recover by reason of negligent acts of the defendant not averred in the declaration as a ground of recovery, even though the acts proven show the defendant was guilty of negligence which caused the injuries. (Citing cases.) When the variance between the declaration and proof is insisted on at the trial, so that the plaintiff has the opportunity to amend his declaration, it is error for the trial court to refuse to direct a verdict if he fails or refuses to amend the declaration. (Citing cases.)"

Under the charges laid in sub-paragraphs (c), (f), and (g) of paragraph 9 of the plaintiffs' complaints there could be no violation of the statutes referred to therein, unless the occurrence took place outside the corporate limits of a city, village or incorporated town. The plaintiffs allege that it so took place. The proof is con-

clusive that it did not. There was, therefore, a fatal variance between the proof and the allegations of the complaints.

CONCLUSION.

In conclusion, your petitioner respectfully submits that in the several respects hereinbefore pointed out the trial court and the Circuit Court of Appeals were in error, and that their judgments should be reversed.

Your petitioner, therefore, prays that this Honorable Court may grant its petition for writ of certiorari in the said cause, to the end that the said cause may be reviewed and determined by this Court, as provided by statute, and that the judgments of the said Circuit Court of Appeals and of the District Court of the United States for the Northern District of Illinois, Eastern Division, may be reversed by this Court.

Respectfully submitted,

JOSEPH H. HINSHAW,
Attorney for Defendant.

OSWELL G. TREADWAY,
Of Counsel.

APPENDIX.

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS.

1. MAJOR, *Circuit Judge.* This is an appeal from judgments, entered April 25, 1941, awarding damages to each of the five named plaintiffs for personal injuries occasioned by the collision of a passenger motor vehicle, in which plaintiffs were riding, with the rear of a truck owned and operated by the defendant.

2. The contested issues, as stated by the defendant in its brief, are:

> "Whether or not the trial court erred in refusing to instruct the jury to return verdicts finding the defendant not guilty and in overruling the defendant's motions for judgments notwithstanding the verdicts. The defendant contends:
>
> "(a) That the evidence is insufficient to support the verdicts, and
>
> "(b) That there is a fatal variance between the allegations of the plaintiffs' complaint and the proof adduced on the trial."

3. Plaintiffs present the further contention that defendant's motions for a directed verdict made at the close of plaintiffs' case, and at the close of all the evidence, specified no grounds therefor, and for that reason were properly overruled. This contention is predicated upon Rule 50 (a) of the Federal Rules of Civil Procedure, which provides:

> "* * * A motion for a directed verdict shall state the specific grounds therefor."

It is further contended that the motions for directed verdict being insufficient, it follows that defendant's

motion after verdicts for judgments, notwithstanding the verdicts, must also fail. In view of our conclusion that the cases were properly submitted to a jury, we find no occasion to decide or discuss the questions presented by the plaintiffs in this respect.

4. Originally three suits were commenced by the plaintiffs in the State Court of Cook County, one by Miller, one by Foster, and the other by Browne, Shoffner and Wagner. The causes were removed, on application of the defendant, to the United States District Court where they were consolidated and tried together. The jury rendered verdicts for each of the plaintiffs, upon which were entered the judgments in controversy.

5. The collision, resulting in the damages complained of, took place shortly after 10:00 o'clock on the evening of April 4, 1939, on Skokie Highway, also known as U. S. Route 41, at a point at or near the corporate limits of the Village of Glencoe.[1] Skokie is a paved four-lane highway, forty feet in width, substantially level and runs in a general northerly and southerly direction. At the time of the collision, there were standing either on the pavement for southbound traffic, or on the shoulder off that side and headed south, four transport trucks. These trucks were thirty-five feet in length and stood about fifteen feet apart. It is to be observed that these were not trucks of the defendant, but it seems important to make some statement concerning them. The first of these to arrive, owned by the Bartzen Transportation Company, stopped on the west shoulder of the highway. When the driver attempted to start, he found its wheels had sunk into the shoulder and he was unable to return it to the pavement. Shortly thereafter, a Checker Express truck, also traveling south, stopped ahead of the

[1] As to whether the collision occurred within or without the incorporated limits of the Village of Glencoe is a disputed question, discussed hereinafter.

Bartzen truck and attempted to pull the latter on to the pavement. Later, a third truck, belonging to the Trans-American Line, arrived from the north and stopped a short distance south of the Checker truck. Thereafter, another truck, the Gateway, also from the north, arrived and stopped a short distance south of the Trans-American truck.

6. In the meantime, three trucks belonging to the defendant, and traveling north, came to a stop on the pavement in the east traffic lane for northbound traffic. When they came to a stop, the rear end of defendant's truck which was furthest to the south (the one with which plaintiffs' car collided) was thirty to forty feet north of the rear end of the Bartzen truck. The only reason for the stoppage of defendant's truck was to assist in getting the Bartzen truck back to the pavement. Reid, the driver of the truck with which plaintiffs' car collided, after stopping, went to the west side of the highway to help protect southbound traffic. The drivers of the southbound trucks had placed a number of kerosene torches and red fusees, perhaps six of the former and from six to ten of the latter, some on the pavement and some on the shoulder of the southbound portion of the highway.

7. Plaintiffs, who resided in Waukegan, were, at the time in question, returning home from Chicago in a Lincoln Zephyr car owned and driven by the plaintiff Miller. The plaintiff Foster was seated in the front seat with Miller and the other three plaintiffs were in the back seat. All the plaintiffs were witnesses at the trial and the substance of their testimony is that they traveled north on Skokie Highway in the east lane for northbound traffic at a rate of speed not in excess of 45 miles per hour; that at a point about 300 to 500 feet south of the point of collision they noticed the red lights

on the west side of the highway; that when they were about even with the truck furthest south on the west side of the highway, there was a sort of fog or haze, produced by the fumes from the kerosene torches and fusees, extending over and across the east side of the highway, which impaired their vision; and that after discovering the situation, the speed of the car was reduced to about ten miles per hour. The atmosphere was variously described as murky or reddish from the reflection of the fusees, as sort of an Indian Summer haze, or as a slight smoke or fog. Foster described the situation just before the crash, thus:

> "* * * We had passed the truck which was in the ditch. I had turned my vision forward again and I saw a small indistinct light on the right-hand side of the pavement ahead of us flashing from left to right. Instantly I thought there was something wrong. I made a movement to nudge Mr. Miller, and looking ahead I saw an object in the center of the lane in which we were traveling. I raised my hand to throw off my glasses. At that instant we hit something which afterwards proved to have been a truck."

8. All the plaintiffs testified that they were looking in the direction in which they were traveling, and saw no light on the rear of the truck with which their car collided, or any other light or warning indicating the presence of the truck, except Foster, who saw a flashlight held by a person about eight or ten feet to the rear of the truck. At that time plaintiffs were about 65 feet away. Also, just before the collision, there was a man in the center of the east southbound lane holding a fusee. Miller, at the time of the collision and for sometime prior thereto, had been driving with what he described as "town lights," also described as "city driving lights," and referred to by the defendant as "dimmers." There is no evidence as to how far an object

could be discerned by such lights. There were, of course, certain discrepancies in the testimony given by various witnesses for the plaintiffs, but what we have related so far, we think, is a rather accurate and fair statement of the situation, briefly stated. Two matters are seriously controverted: (1) Were there any lights on the rear of the truck with which plaintiffs' car collided, and (2) did the collision occur within or without the incorporated limits of the Village of Glencoe? These questions are pertinent in view of certain provisions of the Illinois Statute, which were charged to have been violated. At this point, therefore, it seems material to refer to the charges made in the complaints. (The complaints in each of the three cases are identical so far as concerns the charges of negligence.)

9. Paragraph 9 (c) charges a violation of Section 104; 9 (d) a violation of Section 103; 9 (f) a violation of Section 88, and 9 (h) a violation of Section 121, all of the Uniform Act regulating traffic on highways in Illinois. (Chap. 95½, Illinois Revised Statutes, 1941.) Section 104 requires motor transports operated outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, to display on the rear thereof "three red lights plainly visible at a distance of at least 500 feet." Section 103 requires every motor vehicle, trailer or semi-trailer to exhibit in the rear a lighted lamp so situated as to throw a red light visible for at least 500 feet in the reverse direction. Section 88 provides it is unlawful to stop, park or leave any vehicle upon any highway outside of a business, residence or suburban district when it is practical to stop, park or leave such vehicle off of the paved part of such highway. Section 121 requires a motor truck operating outside of a business or resident district to carry a sufficient number of flares, electric lanterns or other signals capable of producing three warning lights, each visible for a

distance of 500 feet, and when such truck is disabled and can not be immediately removed from the traveled portion of the highway, that one of such signals be placed 100 feet in advance, another 100 feet to the rear and another upon the roadway side thereof. There is some dispute as to whether Section 88 is limited to highways outside of the incorporated limits of a city or village.

10. The complaints alleged that the collision occurred outside the limits of any city, village or incorporated town. By its answer, defendant expressly admitted such allegation. Defendant now contends, however, that the evidence discloses the collision occurred within the incorporated limits of Glencoe. In support of this statement, a map, showing various landmarks at and near the point of collision, is relied upon. It is true this map is in evidence, but it is also true that the court instructed the jury, at plaintiffs' request, to disregard any reference on the map to the Village of Glencoe and any designation as to incorporated and unincorporated territory. This motion was allowed for the reason that the court considered the map unreliable. When defendant admitted by its pleadings, that the collision occurred outside of the incorporated limits of Glencoe, there was no burden upon the plaintiffs to make such proof, and, as stated, there is nothing in the record which would justify a contrary holding. Thus, we think that Section 88 is applicable, as well as Sections 103, 104 and 121. Furthermore, the motion for directed verdict because of variance was properly denied.

11. There is evidence to the effect that a suitable place was available a short distance north of the point where defendant's trucks were stopped where they could have parked off the pavement. The evidence as to the absence of any light on the rear of the truck in question is

rather meager. There is the testimony of all the plaintiffs, however, that they were looking in that direction and saw no light of any kind. In addition, there is the testimony of a State Highway police officer that when he arrived about fifteen or twenty minutes after the accident, there was no light of any kind on the rear of the truck involved in the collision; that when he called this to the attention of Reid, the driver of such truck, Reid went between the trailer and the truck, did something, and the lights went on. The mere fact that the lights were out at that time does plaintiffs little, if any, good for the reason it might well be assumed that they were out as a result of the collision. An inference of this kind, however, is largely destroyed by Reid's demonstration. We think this incident, in connection with the testimony of the plaintiffs, was sufficient to justify a jury in concluding there were no lights on the rear of the truck. The defendant further contends that another witness testified he saw lights on the rear of defendant's trucks. This witness also testified, however, that he saw two trucks only, and inasmuch as it is conceded there were three, such testimony proves nothing insofar as the third truck was concerned.

12. This brings us to the vital question as to whether, under such circumstances, the court erred in overruling defendant's motion for directed verdicts. In support of its contention in this respect, defendant argues (1) there was no negligence on the part of the defendant, (2) the plaintiffs were guilty of contributory negligence as a matter of law, and (3) the proximate cause of the collision was the negligence of the driver of the car in which the plaintiffs were riding, and not the stoppage of its trucks upon the highway.

13. From what we have said, it follows that defendant's negligence was plainly disclosed. On our conclusion

from the record that the collision occurred outside of the incorporated limits of Glencoe, there was evidence of a violation of all of the sections of the Statute as charged in the complaints. But even if we be in error in this respect, there is evidence, as pointed out heretofore, of a violation of Section 103. Also of Section 121, which is applicable to a highway outside of a business or residence district, and, regardless of whether the collision happened within or without the incorporated limits, there can be no question but that it happened beyond the business or residence district. Furthermore, the complaints contained numerous charges of general negligence. It is sufficient to refer to 9 (e), which charges negligence in failure to provide or maintain a lookout for northbound traffic. It is not disputed but that one charge of negligence is sufficient to sustain the verdicts. In our opinion, the charges of general negligence were sufficient. Even if it be assumed that defendant's truck contained a light or lights on the rear as contended, it was still a jury question as to whether those in charge of defendant's trucks gave such warning to approaching vehicles as would free defendant from a charge of negligence. It must not be overlooked that a highway is a place for travel and not for parking. This is not a situation of unavoidable stoppage, as is sometimes referred to by the courts. The trucks were stopped without legal reason or excuse. "* * * Our courts have held that the only excuse for stopping on the pavement is an emergency or exigency which leaves no other choice. (Citing many Illinois cases.) * * *" *Fitzpatrick* v. *C. & H. Sugar Ref. Corp., Ltd.*, 309 Ill. App. 215, 219. Irrespective of the reason for stopping, however, there was the duty to give proper and adequate warning to other motorists who might be using the highway. For failure in this respect, the negligence was inexcusable. Apparently defendant's drivers became so interested in

the doings on the opposite side of the highway and in protecting southbound traffic that they forgot about the hazard which they had created to northbound traffic.

14. Defendant earnestly insists that plaintiffs were guilty of contributory negligence as a matter of law. On this issue a more serious question is presented. It is argued that by the exercise of ordinary care, plaintiffs could have seen the truck in time to have stopped, or to have passed it to the left. It is particularly stressed that the driving of plaintiffs' car with town or dim lights was negligence, and that if their vision was obscured by fog or haze, they were negligent in failing to reduce their speed so as to enable stoppage within the range of their vision. Defendant cites a number of cases in support of its argument in this respect. It would not be practical to refer to more than a few. The case of *Cooney* v. *F. Landon Cartage Co.,* 308 Ill. App. 444, strongly relied upon, furnishes defendant little, if any, support. There the driver of the parked truck had run out of gas and was forced to leave his truck standing on the highway. Four lights were burning on its rear at the time of the collision. The driver of another car following that driven by the plaintiff saw such lights when three or four blocks away, and when 500 feet away was able to determine that the parked truck was not moving. The court reasoned, under such circumstances, that the failure of the plaintiff to discover the stopped truck was negligence and reversed a judgment in favor of the plaintiff.

15. *Johnson* v. *Kushler,* 269 Ill. App. 553 perhaps furnishes stronger support for defendant's position. Of course the facts are dissimilar, but the court held that plaintiff was negligent in permitting his car to be driven on a country highway with dim lights. While that may be negligence under some circumstances, we are of the

view that it is not negligence *per se* under the circumstances of the instant case. We may take judicial notice of the fact that there is an extremely large amount of traffic on Skokie Highway, and there must be times and occasions when an ordinarily prudent person would consider it safe to drive with town lights. With the condition of the atmosphere, foggy and hazy as shown, at and near the point of collision, it is purely a matter of speculation as to whether the bright lights would have been of assistance. There is room for the thought that they might have been harmful rather than helpful.

16. It is not contended that plaintiffs were driving at an excessive rate of speed. As they approached the point of collision, they were presented with what we think may be termed an extraordinary situation. Flares and torches were burning on the opposite side of the road where four large trucks were stopped. Their attention must have been diverted to some extent. They had a right to assume that the lane on which they were traveling was free of obstruction or, if not, that the one responsible for its blockage would give adequate and proper warning thereof. It may be the duty of the driver of a motor vehicle, when engulfed in fog, to reduce his speed, or perhaps stop, to avoid collision with an object in front. This, however, is not a situation of that character. There was nothing to interfere with their vision until they arrived at a point some 200 feet south of the point of collision. The speed of the car was reduced to some ten or twelve miles per hour. In our judgment, it can not be said that plaintiffs were negligent as a matter of law. As to whether they were in fact negligent was a matter peculiarly within the province of the jury. It is well to keep in mind that it is easy for a person, skilled or otherwise, to dissertate on what could or should have been done to avoid an accident. Circumstances and conditions, difficult and

confusing, when faced, appear simple in retrospect. Hindsight may give a more accurate appraisement than foresight, but the existence or want of ordinary care must be determined from the latter rather than the former point of view.

17. What we have said applied generally to the plaintiffs. There is no occasion to consider separately those who were mere passengers in the car. From our conclusion that the case of Miller (driver of the car) was properly submitted to the jury, it follows that the causes of the other plaintiffs were also properly submitted. It also follows there is no merit in defendant's contention that its truck, standing on the highway, was merely a condition by which the collision was made possible, and that it was not the proximate cause thereof. *Fitzpatrick* v. *C. & H. Sugar Ref. Corp., Ltd.,* 309 Ill. App. 215. *Bos* v. *Richards,* 71 F. (2d) 262.

The judgment is

AFFIRMED.

FILED
JUL 18 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1[redacted] 119

ADVANCE TRANSPORTATION COMPANY,
A CORPORATION,
Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER AND ALBERT F. WAGNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LLOYD D. HETH,
Attorney for Plaintiff.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1941.

No. 1285.

ADVANCE TRANSPORTATION COMPANY,
A CORPORATION,
Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER AND ALBERT F. WAGNER,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of Additional Facts.

Petitioner (hereinafter referred to as "defendant") has not stated all of the pertinent facts, and has misstated some of the evidence. For a complete picture of the occurrence a supplemental statement is, therefore, required.

At about 10:00 o'clock at night, the driver of a southbound truck on Skokie Highway (a 4-lane paved country highway and one of the main intercity arterial highways

leading north from Chicago) pulled off the highway to the west and was unable to get back on the pavement. Fellow truckers traveling south stopped to assist and to pull the stalled truck back onto the pavement. Shortly thereafter three of defendant's drivers, northbound, seeing the situation, stopped and parked their three large "boxcar" trucks on the righthand or east lane of the paved highway, one directly ahead of the other. There was no necessity for stopping where they did. None of their trucks was out of fuel or had any mechanical breakdown. Immediately beside the place where the three trucks stopped there was a good solid shoulder 9½ feet wide, made of crushed stone, clay, and grass (R. 105). Just a few minutes before the accident, a large 35 foot truck had pulled off the pavement onto this shoulder, stayed there a few moments, and then, without difficulty, pulled back onto the highway and went on (R. 71 and 81). After the accident, a large tow truck used this shoulder (R. 106), as did a number of other automobiles. The shoulder ran north for about 200 feet where it widened out into a large apron 500 feet long and 50 feet wide, made of hard half-inch and quarter-inch stone. This was a parking place for cars in front of the Chalet roadhouse (R. 109).

There was at the time of the accident, in full force and effect in the State of Illinois, a statute, § 88, Chap. 95½ (see Appendix), making it unlawful for any person to stop, park or leave standing any vehicle, whether attended or unattended, upon any highway outside of a business, residence or suburban district upon the paved, improved or main-traveled part of the highway when it is practical to park, stop or so leave such vehicle off such part of said highway.

After coming to a stop on the pavement, Reid, the driver of the defendant's rear truck (with which the plaintiffs collided), abandoned his truck and went over across the

highway with a lighted fusee in his hand and stood beside the mired truck on the west side of the highway, helping protect southbound traffic (R. 85). He was over there three or four minutes before the collision occurred (R. 86). After the collision, Reid told the highway police officer that he had used up all of the red fusees he had in his truck helping the fellow on the west side, who was in the ditch, and that at the time of the collision "he was over on the west side helping the fellow who was in the ditch" (R. 467).

The driver of another of defendant's trucks likewise left his truck and proceeded to the west side with a lighted fusee in his hand (R. 74). At no time prior to the collision in question did any of the truck drivers of the defendant put out any flares or fusees near or around or behind any of the defendant's trucks. All of the trucks of the defendant carried a supply of red fusees, but the only light, guard, protection or warning of any kind used or put out at the rear of defendant's parked truck to warn northbound traffic was a small flashlight in the hand of the driver of the defendant's head truck, who was standing about 8 or 10 feet behind Reid's truck. None of the plaintiffs, except Foster, saw this flashlight (R. 205).

As to tail or rear lights on the defendant's truck, the plaintiff, Foster, testified that "there were no lights that I saw on the rear of that truck" (R. 205). The plaintiffs, Shoffner (R. 157), Wagner (R. 137), and Miller (R. 249), all testified that they did not see any lights on the rear of defendant's truck.

The State Highway police officer arrived at the scene about 15 or 20 minutes after the accident. He testified that there was no tail light of any kind on the rear of defendant's rear truck (R. 101); that he asked the driver, Reid, what was the matter with his rear lights, and Reid went back to look, saw there were no lights, then went up

between the trailer and the truck and did something, whereupon the lights went on (R. 102).

The body of the defendant's truck was about 12 feet high, and the entire rear of it was closed with a tail gate, painted red. There was a large number of red flares, lighted and burning on the west side of the highway, and these flares cast a red glow into the atmosphere and over the landscape, causing the red body of the truck to blend into the surroundings so as to make it undiscernible as one traveled toward it. There was also a number of kerosene flare pots on the west side, the smudge and smoke of which was being blown across the highway from the west.

Reasons Why Petition for Certiorari Should Be Denied.

1. No special or important reason, as suggested by Rule 38 (5) of the rules of this court, is presented in this case for granting certiorari. The case involves nothing except the usual, ordinary issues of fact in negligence cases, to-wit: the negligence of the defendant, freedom from contributory negligence, and proximate cause of injury.

2. In affirming the judgment of the trial court, the Circuit Court of Appeals has followed the well-established law laid down by the Supreme and Appellate Courts of Illinois and the United States, that the questions of the existence of negligence, freedom from contributory negligence, and proximate cause are questions of fact for the jury and become questions of law only when there is no evidence in the record which fairly tends to prove these elements of the plaintiffs' case.

3. The Circuit Court of Appeals committed no error in holding that there was no variance between the allegations of the complaints that the accident happened outside

the limits of any city, village or incorporated town, and the proof adduced, because:

(a) By its sworn answers the defendant admitted the allegations of the complaints;

(b) The plaintiffs introduced no proof contrary to the allegations;

(c) The only proof offered by the defendant that the accident occurred inside an incorporated area was stricken, and the jury instructed by the trial court to disregard it; (No error was ever assigned by the defendant on such ruling.)

(d) The alleged variance was not material or fatal because there were eight specifications of negligence, including general negligence, set forth in the complaint, at least five of which pertained to both incorporated and unincorporated areas.

SUMMARY OF ARGUMENT.

I.

No Special or Important Reason, as Suggested by Rule 38 (5) of the Rules of This Court, Is Presented for the Granting of the Writ.

(See Argument.)

II.

The Circuit Court of Appeals Has Followed the Well-Established Law Laid Down by the Supreme and Appellate Courts of Illinois and the United States That the Existence of Negligence, Freedom From Contributory Negligence, and Proximate Cause Are Questions of Fact for the Jury.

a. **The evidence is sufficient to support the verdicts.**

Shannon v. *Nightingale*, 321 Ill. 168, 175.

Long Transp. Co. v. *Domurat, et al.*, 93 Fed. (2d) 23, 24.

Gunning v. *Cooley*, 281 U. S. 90, 94.

Grand Trunk Railway Company v. *Ives*, 144 U. S. 408, 417.

Western & Atlantic R. R. v. *Hughes*, 278 U. S. 496, 498.

b. **The question of plaintiffs' contributory negligence was one of fact and not of law, and was properly submitted to the jury.**

Skamenca v. *Reeser*, 294 Ill. App. 216, 221.

Mapes v. *Hulcher*, 363 Ill. 227, 228, 231.

c. **Driving with dimmer or deflected lights is not negligence as a matter of law, but the question of negligence in such case is one to be determined in view of all the facts and circumstances in evidence**

Miller v. *Burch,* 254 Ill. App. 387, 391, 394, 397.

Carroll v. *Krause,* 295 Ill. App. 552, 566.

d. **The plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed, and their actions after entering the area of smoke and glare were those of reasonably prudent men, in view of all the surrounding circumstances.**

Sidle v. *Baker,* 52 Ohio App. 89, 93, 94; 3 N. E. (2d) 537.

Body, Fender & Brake Corp. v. *Matter,* 172 Va. 26, 30-2; 200 S. E. 589.

Moyer v. *Vaughan's Seed Store,* 242 Ill. App. 308, 312, 313.

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e. **The illegal parking on the highway of defendant's truck was the proximate cause of plaintiffs' injuries.**

Rhoden v. *Peoria Creamery Co., et al.,* 278 Ill. App. 452, 462-3, 467.

Bos v. *Richards,* 71 Fed. (2d) 262, 263.

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Mapes v. *Hulcher,* 363 Ill. 227, 228, 231.

III.

There Was No Variance Between the Allegations of the Complaints and the Proof.

(See Argument.)

ARGUMENT.

I.

No Special or Important Reason, as Suggested by Rule 38 (5) of the Rules of This Court, Is Presented for the Granting of the Writ.

This is an ordinary negligence case arising out of a collision between defendant's parked truck and the automobile in which plaintiffs were riding. It involves nothing except the usual ordinary issues of fact in negligence cases, namely, the negligence of the defendant, freedom from contributory negligence, and proximate cause of injury. No new or unusual principles of negligence law are involved nor have established principles been erroneously applied or departed from so as to give the subject case sufficient importance to be reviewed by this court.

We do not believe it necessary, in order to point out to this court the lack of necessity for its review of this cause, to answer in detail all of the arguments of fact and quotations from cases contained in defendant's 75 pages of brief in support of its petition for certiorari. We shall, therefore, limit ourselves to a few authorities on the issues involved, all establishing that the Circuit Court of Appeals correctly applied and followed the Illinois law in holding that the issues here involved were properly questions of fact for the jury.

II.

The Circuit Court of Appeals Has Followed the Well-Established Law Laid Down by the Supreme and Appellate Courts of Illinois and the United States That the Existence of Negligence, Freedom From Contributory Negligence, and Proximate Cause Are Questions of Fact for the Jury.

No motion for new trial was made and no error is alleged in the court's rulings on evidence or the giving or refusal of instructions. Defendant has failed to preserve in the printed record the instructions given or refused and the inference from such failure necessarily must be that the trial court followed the rule of *Erie R. Co.* v. *Tompkins* and properly instructed the jury as to the elements which, under the law of Illinois, the plaintiffs were affirmatively required to prove in order to recover, including freedom from contributory negligence. The only error assigned by defendant is that the trial court erred in refusing to direct verdicts for defendant and to set aside the verdicts and enter judgments for the defendant because defendant contends: (1) As a matter of law the plaintiffs did not prove that (a) the defendant was negligent; (b) the plaintiffs were free from contributory negligence; (c) the parking of the truck on the paved highway was the proximate cause of the injury, and (2) There was a variance between the complaint and the proof as to the location of the accident.

a. The evidence is sufficient to support the verdicts.

We direct the court's attention to some of the leading cases setting forth the rule as to when the court should or should not direct a verdict.

In *Shannon* v. *Nightingale,* 321 Ill. 168, 175, the Illinois Supreme Court said:

"If there is evidence which fairly tends to support

the plaintiff's case it must be submitted to the jury, (*Purdy* v. *Hall,* 134 Ill. 298; *Pullman Palace Car Co.* v. *Laack,* 143 Ill. 242; *Lake Shore and Michigan Southern Railway Co.* v. *Richards,* 152 Ill. 59; and no question of its sufficiency to support the verdict can be raised in this court. It is a question of law whether there is any evidence tending to prove the allegation of the plaintiff's declaration, and it is a question of fact, where there is such evidence, whether it is sufficient to sustain such allegations. The former is a question for the court; the latter is a question for the jury, subject to revision by the court on motion for a new trial. Therefore the court may not properly take the case from the jury and direct a finding for the defendant when there is some evidence tending to prove every essential allegation of the plaintiff's declaration, merely because, in the judgment of the court, the weight of the evidence in support of some material allegation is not sufficient to sustain a verdict for the plaintiff. If the evidence in support of the plaintiff's allegations is sufficient to make a prima facie case, the court is not authorized to direct a verdict for the defendant because of evidence of contrary facts tending to an opposite conclusion. On the motion to direct a verdict only that evidence can be considered which is in favor of the party against whom the motion is directed, and that evidence must be considered in the light most favorable to that party, together with all legitimate inferences which may be drawn from it in his favor."

The above case was cited with approval in *Long Transp. Co.* v. *Domurat, et al.,* 93 Fed. (2d) 23, 24, wherein the court said:

"Under this situation we are urged to hold that the trial court erred in its refusal to direct a verdict in favor of appellant. In other words, we are asked to say, as a matter of law, either there was no evidence proving negligence of appellant, or that the evidence shows appellees' negligence was the contributing and proximate cause of the accident. The rule has often been announced that we have no duty or right to weigh

the evidence, but merely to ascertain if there is evidence sufficient to sustain the finding of the jury. *Gunning* v. *Cooley*, 281 U. S. 90, 50 S. Ct. 231, 74 L. Ed. 720; *Madison Coal Corp.* v. *Stullken*, (C. C. A.) 228 F. 307; *Shannon* v. *Nightingale*, 321 Ill. 168, 151 N. E. 573."

In *Gunning* v. *Cooley*, 281 U. S. 90, 94 the court said:

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony, or because the facts being undisputed, fair minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

In *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, 417, the court said:

"When a given state of facts is such that reasonable men may fairly differ upon the question * * * the determination of the matter is for the jury. * * * It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question * * * is ever considered as one of law for the court."

In *Western & Atlantic R. R.* v. *Hughes*, 278 U. S. 496, 498, the court said:

"The evidence introduced by the plaintiff was substantial; and was sufficient, if believed, to sustain a verdict in her favor. * * * Some of the testimony given by witnesses for the Railroad would, if believed, have entitled it to the verdict as a matter of law. Some of the testimony given by witnesses called by the plaintiff does not seem to us persuasive. But the credibility of the witnesses and the weight of the evidence were obviously matters for the jury. The defendant was not entitled to a directed verdict."

It is charged in the Complaint (R. 4) that the defendant was careless and negligent in the operation and control of its motor truck in one or more of eight specified ways, to-wit: that it carelessly and negligently stopped and parked its motor truck at a place where it was known or

should have been known it was dangerous to northbound vehicles on the highway, in that it was known or should have been known that its red truck so blended in with the red glow of the landscape and was so obscured by smoke and fumes and gases as not to be discernible until it was too late to prevent a collision; that it parked its truck on the highway without having any tail light or other light burning and without in any way indicating its presence; that in violation of sections 103 and 104 of the Illinois statute on motor vehicles, the truck did not have lights on the rear which were visible for at least 500 feet; that it failed to provide or maintain any lookout for northbound traffic and that in violation of Section 88 of the said Act, it carelessly and negligently stopped and parked its truck upon the highway when it was practical to remove it.

We refer this court to paragraph 13 of the opinion of the Circuit Court of Appeals wherein, after analyzing the evidence to support the allegations of negligence, it finds evidence tending to support some or all of the claims in question. Nothing will be served at this point by an extensive discussion of the evidence involved, but we submit that if this court reviews the evidence it can come to no other conclusion than that set forth in paragraph 13 of the opinion of the Circuit Court of Appeals "that defendant's negligence was plainly disclosed" and that there is evidence to support the violation of all of the sections of the statute charged in the complaints, as well as the numerous charges of general negligence.

b. The question of plaintiffs' contributory negligence was one of fact and not of law, and was properly submitted to the jury.

In support of its contentions that defendant's acts were not the proximate cause of plaintiffs' injuries and that plaintiffs were guilty of contributory negligence, defendant has cited or quoted from approximately 30 cases.

The existence of negligence or contributory negligence in any particular personal injury case depends upon *all* of the facts and surrounding circumstances in that case, and it serves little purpose to cite holdings or quotations from other cases where but one of the elements of negligence of the instant case is involved. We, therefore, direct attention only to those cases that seem to bear some analogy to the facts in the instant case.

Defendant places great stress, as being controlling in the instant case, upon *Cooney* v. *F. Landon Cartage Co.*, 308 Ill. App. 444, wherein the plaintiff collided with the rear of a parked truck. We submit that the facts in that case differ widely from those in the instant case.

In the *Cooney* case the evidence clearly established that there were at least four red lights burning on the back of the truck at the time of the collision. It was proven that such red lights were seen by the driver of another car when he was about three or four blocks away, and that when he was approximately 500 feet away he was able to determine that the parked truck was not moving. There was nothing to impair visibility. The driver of the parked truck had run out of gas and was forced to leave his truck standing on the highway. The speed of plaintiff's car at the time of the collision was estimated all the way from 45 to 70 miles per hour. These facts surely bear no analogy to the instant case in which there was evidence of factors that impaired visibility, of the absence of lights on the rear of defendant's truck, of the fact that the defendant's truck was not visible until the plaintiffs were right upon it, that plaintiffs were traveling at a speed of from 15 to 20 miles per hour, and that there was no need whatever for the defendant to stop upon the highway.

The distinction in the cited case of *Geisen* v. *Luce*, 185 Minn. 479, is immediately apparent. The standing car was disabled and it was not practical to move it. The accident happened in daylight, and the court points out that as to

the standing car, "*Its presence was known to all; it created no surprise;* it did not obstruct a view of the traffic." In the case at bar, defendants' trucks were not disabled; it was practical to park them on the shoulder, or on a large gravel parking space a short distance ahead; their presence was not discernible and they certainly created a tragic surprise to plaintiffs.

In *Hogrefe* v. *Johnson,* 271 Ill. App. 469, and *Johnson* v. *Kushler,* 269 Ill. App. 553, the weather and road conditions, the acts of the parties and the fact that the cars run into were moving and not parked, furnish obvious differentials.

It is apparent from the quotations from the other cases cited by defendant that plaintiffs therein either did see, or unquestionably should have been able to see, the obstruction—conditions not present in the case at bar. It is also worthy of note that in all the other cases cited by defendant involving vehicles parked on the highway, the driver of the parked vehicle had no other choice than to leave his car or truck where it was.

The tendency of Illinois courts to avoid a rule of thumb as to what constitutes contributory negligence as a matter of law is well illustrated in *Skamenca* v. *Reeser,* 294 Ill. App. 216, wherein the court said (p. 221):

> "Owing to the density of the fog, the circumstances mentioned and the conflict in the evidence we are satisfied that all reasonable minds would not agree that the failure of the plaintiff to have lights of sufficient brilliancy to penetrate the fog and enable him to see 200 feet ahead constituted negligence. • • •
>
> "By this instruction the jury were told that the plaintiff must keep a lookout for other cars on the highway and then directed that his lookout must be such that if another car was on the highway he must see it when it was such distance from him that he would still have time to stop or slacken his speed and avoid a collision and that failure to do so constituted negligence.

"The rule embodied in this instruction is akin to the principles announced in *Lauson* v. *Town of Fond du Lac*, 141 Wis. 57, and cases in other jurisdictions where it is held that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such a speed that it cannot be stopped within the distance that objects can be seen ahead of it. In the *Moyer* case, 242 Ill. App. 308, the Appellate Court of the first district declined to follow those cases and held under the facts of that case the question of contributory negligence of the plaintiff was one of fact and not of law. To the same effect is *Miller* v. *Burch*, 254 Ill. App. 387.

"It is well settled that one driving an automobile upon the public highway must be on the lookout for other cars and must use every reasonable precaution he can to avoid collision but under the circumstances surrounding the collision in this case it was for the jury to say what kind of a lookout would be required of the plaintiff to avoid being guilty of contributory negligence."

In *Mapes* v. *Hulcher*, 363 Ill. 227, facts stated by the court (p. 228), were as follows:

"There is no controversy but that on the night of the accident the truck in question was stalled and standing either on, partly on or off of the concrete slab on this road, near the village of Hamel. Just where it (defendant's truck) was standing and why it was standing there, as well as the question of whether or not there were any lights on it, were controverted questions of fact. It was snowing on the night in question, and it is apparent from the testimony of all witnesses that visibility was limited and difficult. There was considerable evidence for the plaintiff that there was no light at all on the truck in question and that it was standing on the concrete slab. There was also evidence tending to prove that it was standing at a point near the bottom of a hill or incline some four hundred feet long, and that, even if the engine was stalled, it would have been possible for the driver, had he seen fit, to have coasted off of the slab to a stop by

the side of the road instead of on it. Several witnesses testified as to the lack of any lights at all on the truck and to the effect that it was standing on the slab. Two witnesses testified to its being stopped at a point near the bottom of an incline, so as to make it appear from the record that the driver had a choice as to whether he would stop on or off the hard-surfaced portion of the road. * * *

"He (defendant) testified that when he left Edwardsville all the lights were burning on the truck, including the head-lights, three lights on the cab and four lights on the trailer; that about eight miles north of Edwardsville the motor quit running and the truck stopped on the side of the road; that on examination he found himself unable to move it and that the battery appeared to be run down, and that he did not intend to stop there but did so entirely because of the failure of his engine. He further testified that all of his lights were burning before the collision. It was his testimony that he tried to stop the car in which the plaintiff was riding and waved a spotlight at them, and that the approaching car was traveling at an excessive rate of speed and ran into his truck with considerable force. There was testimony of some other witnesses that they saw lights on the truck after the accident. * * *"

After reviewing the conflicting evidence the court stated (p. 231):

"Our review of the evidence leaves it entirely clear that the trial judge had before him conflicting lines of evidence to be weighed and that we should not disturb his findings. If he believed the testimony of the driver of the car and of the plaintiff, it was an entirely sufficient foundation for a finding that the plaintiff was in the exercise of due care for her own safety at the time of the accident. If he believed the plaintiff's witnesses, the truck was without lights and stopped on the slab, when it might with equal convenience and greater safety to the public have been stopped off to one side of the road. There is sufficient evidence for all necessary factual findings, and we cannot see that there

has been any such finding that can be said to be contrary to the weight of the evidence or without evidence to support it."

c. Driving with dimmer or deflected lights is not negligence as a matter of law, but the question of negligence in such case is one to be determined in view of all the facts and circumstances in evidence

The Illinois courts have held that one is not necessarily contributorily negligent as a matter of law merely because he is driving with dim lights, but that such question is one to be determined in the light of all the surrounding circumstances existing at the time of the occurrence.

In *Miller* v. *Burch*, 254 Ill. App. 387, defendant was parked on the wrong side of the street. Plaintiff, proceeding at from 15 to 25 miles per hour, collided with defendant's car. The lights on plaintiff's car were on dim and, according to his own testimony, did not illuminate the road more than about 3 feet in front of the car and were of no assistance to him in distinguishing objects at more than that distance. Whether defendant's lights were on was a disputed question. Defendant contended that the plaintiff was guilty of contributory negligence as a matter of law and that the trial court should have directed a verdict in defendant's favor.

The court stated (p. 391):

"This brings us to a consideration of whether defendant's conclusion that plaintiff was guilty of negligence as a matter of law is a correct one, basing his conclusion, as he does, on the single fact that plaintiff was running with his lights on dim. * * *

"We are aware that in a number of cases in Illinois, and among them the case of *Johnson* v. *Gustafson*, 233 Ill. App. 216, cited and relied on by defendant, the statement will be found that the violation of a statute or ordinance is negligence as a matter of law.

"In most of the cases examined, the decision was

not based on the statement that plaintiff was guilty of negligence as a matter of law, nor was it necessary to the decision. * * *

"In short, whether under all the conditions and circumstances surrounding plaintiff as he proceeded south on Court Street, his conduct was 'So violative of all standards of conduct applicable to persons in a like situation' that all reasonable minds would conclude that he was negligent. If it was not, then, although he may have been negligent as a matter of fact, he could not properly be said to be negligent as a matter of law. Hence the jury was properly permitted to pass on that question of fact, and if the jury had a basis in the evidence for finding that the conduct of the plaintiff did not constitute negligence then, in such case, no one would contend there could be such a thing as negligent contribution to the cause of the injury, negligence of plaintiff having been eliminated (p. 394). * * *

"We do not think our courts have, in any case, construed our statute as meaning the lights shall so illuminate the road that the driver 'could see at least two hundred feet in the direction in which he was driving,' nor do we think they have ever held that the failure to have such lights or to so use them, if he has them, of itself alone, constitutes negligence, so that the proof of that fact alone is sufficient to establish negligence" (p. 397).

In citing *Scruggs* v. *Baltimore & Ohio R. Co.*, 287 Ill. App. 310, defendant quotes a small portion of the opinion, without giving sufficient of the facts to explain the decision. Considering that in that case it was a bright, clear, moonlit night with no shadows or obstructions affecting visibility, plaintiff therein, had she been looking, should have been able to see a box car 40 feet long and 10 or 12 feet wide standing on the track across the highway at more than 20 feet without any lights at all. The decision was clearly predicated upon the fact that the evidence showed that plaintiff was not observant.

It is apparent from defendant's quotation from *Johnson* v. *Kushler,* 269 Ill. App. 553, that the court did not state without qualification or limitation that one driving on a country highway at night without his bright headlights burning is negligent, but that "under *all* the facts and circumstances in evidence in this (*Johnson* v. *Kushler*) case," the plaintiff was so guilty. *Johnson* v. *Gustafson,* 233 Ill. App. 216, and *Sugru* v. *Highland Park Yellow Cab Company,* 251 Ill. App. 99 are cited in support of the quotation from *Johnson* v. *Kushler.* Neither is in any way analogous to the case at bar. In *Johnson* v. *Gustafson,* the automobile was "equipped with ordinary headlights, but that they were not lighted" (p. 219) and it is obvious that in *Sugru* v. *Highland Park Yellow Cab Company* that the headlights were not lit and that "only the parking lights and spotlight were used."

In the case at bar it is not disputed that the headlights on plaintiffs' car were lighted, those filaments in the headlight bulbs being used which provided a more concentrated, downward focused light, commonly called town, driving or dimmer lights.

A case in point is *Carroll* v. *Krause,* 295 Ill. App. 552, wherein defendant's truck, parked on the highway due to a blowout, was struck from the rear by a car in which plaintiff's intestate was riding. The court said (p. 566):

> "As stated, it is contended by the defendant that the decedent was guilty as a matter of law of contributory negligence in riding in the Essex coach before and at the time of the accident, because the car was, before and at the time of the accident, being driven with dim lights.
>
> "Ferry, the driver of the Essex car, testified that for some hours before, and at the time of the accident, he was driving the car with dimmers; that at the time of the collision he was driving the car at the speed of about 35 to 40 miles per hour; that he did not see the truck before the collision until he was

about 20 feet from it; that he could see ahead with the lights dimmed, about 50 feet. Sexton, who was riding with Ferry, testified that the lights on the car threw a beam of light about 10 to 15 feet ahead of the car. * * *

"It has *not* (italics ours) been held that proof of the fact that the lights of a car were not sufficiently bright to disclose objects in front of the car for a distance of 200 feet is alone sufficient as a matter of law to prove negligence on the part of the driver of the car, in the event of the car colliding with an unlighted motor vehicle on the highway. * * * However, the question of whether the driver of the car, before and at the time and place of the collision, was negligent, depends on all the facts and circumstances shown by the evidence. * * * Such as: 1. Whether plaintiff should have apprehended the danger. 2. Whether the place where plaintiff was driving, and had a right to drive, was a safe place to drive with dim lights. 3. In short, whether under all the conditions and circumstances surrounding plaintiff as he proceeded along the highway, his conduct was so violative of all rational standards of conduct applicable to persons in like situations that all reasonable minds would conclude that he was negligent. If it was not, then, although he may have been negligent as a matter of fact, he could not properly be said to be negligent as a matter of law. Hence the jury was properly permitted to pass on that question of fact. * * *"

d. The plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed, and their actions after entering the area of smoke and glare were those of reasonably prudent men, in view of all the surrounding circumstances.

Defendant contends that if plaintiffs' view of the parked truck was in fact obscured, plaintiffs, as a matter of law, were negligent if they did not apprehend danger and stop until the obstruction to vision had come to an end. Plaintiff, Miller, testified that in driving up to the lighted area

there was a fog across the east side of the road and that coming into the fog he decelerated (R. 248) and then began to apply his brakes gradually (R. 248); that he didn't know definitely how far he traveled through the fog but that he kept increasing his brakes and that suddenly the fog lifted and a mass appeared ahead of him (R. 248); that he had no idea how fast he was traveling after he applied his brakes because the speed of the car was dropping down constantly and that he did not look at his speedometer because he was keeping his eyes on the road ahead (R. 275). We submit that the foregoing shows that Miller's reaction to the circumstances was that of a reasonably prudent man. Plaintiffs had no reason to believe or anticipate that defendant's truck would be unlawfully parked, without lights, on the highway, camouflaged and obscured by the smoke and glare of the fusees.

The right of a driver of a vehicle to assume that the highway ahead of him is not unlawfully obstructed is illustrated in *Sidle* v. *Baker*, 52 Ohio App. 89, 3 N. E. (2nd) 537 wherein the court said (pp. 93-4):

> "Nor, in the absence of any visible sign of danger, did he (plaintiff) owe to the defendant any duty to assume that the defendant would be unlawfully parked on the highway, directly in his path. On the contrary, he had, under such circumstances, a right to assume that all other users of the highway would use it in a lawful manner, and that if it became necessary to stop they would stop in a lawful manner, and park in the manner prescribed by law. *Hess* v. *Kroger Grocery & Baking Co.*, 17 Ohio Law Abs., 225, 40 O. L. R., 153; *Mossholder* v. *Head*, 13 Ohio Law Abs., 421, 37 O. L. R., 372.
>
> "If the proposition above stated means anything, it means that the plaintiff was entitled to act upon the assumption which he had a right to make, and to rely upon its truth as fully as when he could see it to be true, and to govern the operation of his automobile and its speed accordingly."

In *Body, Fender & Brake Corp.* v. *Matter,* 172 Va. 26, 200 S. E. 589, the court said (p. 30):

> "In the instant case defendant sought to show that a proper warning had been given approaching travelers by the use of a flashlight. Upon this question there was a conflict of evidence and therefore the duty devolved upon the jury to determine whether or not reasonable care had been exercised by the defendant in the operation of its wrecking truck upon the highway. The verdict of the jury resolved the question in favor of the plaintiff. *Ferguson* v. *Virginia Tractor Co.,* 170 Va. 486, 197 S. E. 438, 440. * * *"

Each of the cases cited and relied upon by defendant is readily distinguishable upon the facts. In each of such cases plaintiff either had knowledge of dangerous conditions, express warning thereof or the condition continued for so long a time as to constitute warning or knowledge. In *Johandes* v. *Chicago, M. & St. P. R. Co.,* 260 Ill. App. 328, plaintiff approached a known dangerous railroad crossing with which he was familiar; in *Hazel* v. *Hoopeston-Danville Motor Bus Co.,* 229 Ill. App. 125, plaintiff's driver drove nearly 1000 feet totally blinded; in *Ill. Cent. R. R. Co.* v. *Oswald,* 338 Ill. 270, plaintiff went on foot onto the roadway obscured by smoke knowing that other autos might come along and admittedly without "thinking of other machines"; and in *Dominick* v. *Haynes Bros.,* 13 La. App. 434, both drivers had been stopped by road guards and instructed to turn on their lights, drive slowly and keep to the right side of the road.

In *Moyer* v. *Vaughan's Seed Store,* 242 Ill. App. 308, defendant appealed from a judgment against it, contending that it was entitled to a peremptory instruction at the close of the case, on the grounds that it was negligence, as a matter of law, to drive an automobile along a public highway in the dark at such speed that it could not be stopped within a distance that objects could be seen ahead of it.

The court said (pp. 312, 313):

"In considering the question, the Supreme Court of Iowa in the *Kendall* case, 183 Iowa 866, held that whether the driver of an automobile who failed to have it under such control that he could stop it within the distance that he could plainly see ahead of him, was a question of fact and not a question of law. The court there expressly referred to the *Lauson* case, 141 Wis. 57, and refused to follow it. And in passing on this question the Supreme Court of Connecticut, where the facts were somewhat similar to the facts in the instant case, held that whether the driver of the automobile was guilty of negligence was a question of fact to be determined from the evidence. *Baldwin* v. *City of Norwalk*, 96 Conn. 1; *Rice* v. *Foley*, 98 Conn. 372. So in the case at bar we are of the opinion that whether the driver of plaintiff's automobile was guilty of negligence which contributed to the collision was a question of fact and not one of law, and, therefore, the peremptory instruction requested by defendant was properly refused. Of course there may be situations where it may be negligence as a matter of law for one to drive an automobile along a public highway in the night-time at such speed that it cannot be stopped within the distance that objects can be seen ahead of it. The test in such cases is, would all reasonable minds reach the conclusion that the conduct of the driver of the automobile was violative of rational standards of conduct applicable to persons in similar situations? *Kelly* v. *Chicago City R. Co.*, 283 Ill. 640; *Bale* v. *Chicago Junction R. Co.*, 259 Ill. 476; *Louthan* v. *Chicago City Ry. Co.*, 198 Ill. App. 329; *Rehthaler* v. *Crane Co.*, 218 Ill. App. 267.

"In the instant case we think it cannot reasonably be said that the driver of plaintiff's automobile was guilty of negligence as a matter of law. The night was dark and misty. The plaintiff was driving along a country road where standing vehicles were not to be expected. There is evidence to the effect that there was no rear light on the truck; that the color of the truck and its load blended with the coloring of the

surface of the road. These, and many other circumstances which might be alluded to, show that all reasonable minds would not reach the conclusion that the driver of plaintiff's automobile was acting as no rational person would act under like circumstances, and, therefore, the question to be determined was one of fact and not law."

To the same effect see *Skamenca* v. *Reeser*, 294 Ill. App. 216, 219.

Prior to coming upon the scene plaintiffs herein were traveling at a reasonable and lawful rate of speed. They had no notice of the unlawful presence of defendant's truck, and no reason to anticipate danger therefrom. When his vision became obscured, Miller immediately slowed his speed and continued to slow down until the crash. It surely cannot be said that plaintiffs' conduct was such that all reasonable minds would conclude that it "was violative of rational standards of conduct applicable to persons in similar situations."

e. The illegal parking on the highway of defendant's truck was the proximate cause of plaintiffs' injuries.

In *Rhoden* v. *Peoria Creamery Co.*, 278 Ill. App. 452, 462, the Appellate Court explains the holding in *James* v. *Motor Transit Management Co.*, 260 Ill. App. 246, *Collins* v. *McMullin*, 225 Ill. App. 430, and similar cases cited by defendant, as being limited to holding that where a driver has no other choice except to leave his vehicle upon a portion of the paved road, there may be no liability by reason thereof, but that whenever it is possible to move such vehicle, failure to do so is the proximate cause of injury resulting therefrom.

Other cases cited by defendant, where the obstruction, railroad car, automobile or bus were known or perfectly apparent to anyone driving upon the highway, or where the violation complained of was technical rather than

actual, such as leaving a few inches or a few feet less space than specified, or leaving railroad cars standing overtime, we submit are not persuasive.

Defendant's illegal parking under the circumstances here present was the proximate, not a remote, cause of the collision. In fact, the circumstances here present created a trap for oncoming cars, as in *Emrick* v. *Phillips*, 134 Pa. Sup. Ct. Reports, 45, wherein the court said (p. 49):

> "In the present case while Emrick knew from the flare that a truck was stalled on the southbound traffic lane, he did not know and had no reason to think that it had buckled and part of it was extending over the center line of the road into the northbound lane of traffic, and he did not become aware of the negligent action of defendant's driver in so leaving it, until he was too close to prevent the collision. The flare in the road and the lights from the oncoming automobile diverted his attention from the trap which the negligence of defendant's driver had left in the road, and which the flare in the center of the southbound lane, 150 feet north of the stalled truck, would not give notice of."

In *Fitzpatrick* v. *California & Hawaiian Sugar Ref. Corp. et al.*, 309 Ill. App. 215, defendant Gaskill's attention was attracted to a car turned upside down in a ditch adjoining the highway. He stopped on the pavement to render aid to the ditched car and plaintiff's car, which had been following, ran into his rear. Upon appeal from a judgment for plaintiff the court said (p. 219):

> "In the instant case there was no emergency, beyond the control of the driver of the car which stopped on the paved highway. Defendant Gaskill testified that his purpose in making this stop was to see if he could give some assistance to anybody that might have been hurt in the previous accident. It is argued on his behalf that it was not practical to drive off of the paved highway onto the shoulder, but there is no evidence in support of that, Gaskill's testimony in that

regard being to the effect that there was enough space between the ditch and the paved portion of the highway for him to pull out there on the dirt. However, the question as to whether it was practical for him to have done so is more or less academic, in the light of his reason for stopping. If the humanitarian urge to aid some one in apparent distress was strong enough in the defendant, he could have taken the chance of injury to himself, or damage to his car, and have driven off on the shoulder regardless of its condition. * * *

"There was no evidence that there was anything mechanically wrong with his car, or that there was any obstruction on the highway. Our courts have held that the only excuse for stopping on the pavement is an emergency or exigency which leaves no other choice. *Hand* v. *Greathouse,* 294 Ill. App. 383-388, 13 N. E. (2d) 1010; *Frochter* v. *Arenholz,* 242 Ill. App. 93; *Sugru* v. *Highland Park Yellow Cab Co.,* 251 Ill. App. 99; *Crawford* v. *Cahalan,* 259 Ill. App. 14; *McLaren* v. *Byrd, Inc.,* 296 Ill. App. 345, 15 N. E. (2d) 993; *Mayhak* v. *Edward J. Meyers Co.,* 306 Ill. App. 284, 28 N. E. (2d) 343 (Abst.)."

The issues of fact in *Bos* v. *Richards,* 71 Fed. (2d) 262, are so substantially similar to this case that upon a review of that decision one can come to no other conclusion than that the proximate cause of plaintiffs' injuries was the illegal parking of defendant's truck upon the highway and that the question of such proximate cause was properly submitted to the jury.

To the same effect see:

Moyer v. *Vaughan's Seed Store,* 242 Ill. App. 308, 312-3.

Mapes v. *Hulcher,* 363 Ill. 227, 228, 231.

There was a direct, unbroken causal connection between the illegal parking of defendant's truck and the occurrence complained of; the position of the truck, under the circumstances, constituted a trap for oncoming traffic—a trap

into which plaintiffs fell. There was no necessity for the defendant's driver to stop his truck and cross over to the west side of the road. Even conceding his desire to of assistance, he was, nevertheless, culpably negligent in not pulling off the pavement. The issue of proximate cause was properly submitted to and found by the jury in favor of plaintiffs.

III.

There Was No Variance Between the Allegations of the Complaints and the Proof.

Directly contrary to the record, petitioner herein states that the accident occurred within the corporate limits of the Village of Glencoe and based upon that misstatement, contends that the Circuit Court of Appeals erred in not holding that there was a variance between the allegations and the proof.

It is alleged in paragraphs 3, 4, and 7 of Count I of the complaint (R. 3) that the situs of the accident was outside the limits of any city, village or incorporated town (R. 3). The defendant in its Amended Answer, paragraphs 1 and 2 (R. 17) expressly admit the allegations of time and place of the occurrence (R. 17).

Plaintiffs offered no evidence on this point, and the only evidence introduced by the defendant pertaining thereto was a plat of Skokie Road, Deft's. Ex. 2, (R. 308-10) which purported to show that certain portions of Skokie Road are inside and others outside incorporated areas. The plat is dated April 11, 1941, and purports to show boundaries as they existed on that date—two years after the accident. The trial court struck from the plat all designations as to what was and was not incorporated territory and instructed the jury to disregard them (R. 320). There was thus no evidence of any kind, shape or form in the record as to what were or were not the corporate limits

of the Village of Glencoe and there could not have been any variance between the allegations and the proof on that point.

And even if a variance could be considered to exist it was neither material nor fatal. There were eight specifications of negligence, including general negligence set forth in the complaints, at least five of which without question pertained to both incorporated and unincorporated areas, and any one of which is sufficient to sustain the verdicts.

Conclusion.

It clearly appears that in affirming the judgment of the trial court, the Circuit Court of Appeals has not "decided any important question of local law in a way probably in conflict with applicable local decisions." Quite to the contrary, its decision is entirely in accord with and based upon principles repeatedly announced by the Supreme and Appellate courts of Illinois in negligence cases.

It is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Lloyd D. Heth,
Attorney for Plaintiffs.

APPENDIX.

Uniform Act Regulating Traffic on Highways. Chap. 95½, Illinois Revised Statutes.

Article XIII.

§ 88. Stopping, standing, or parking outside of business, residence or suburban district. (a) Upon any highway outside of a business, residence or suburban district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of 200 feet in each direction upon such highway. * * *

(c) This section shall not apply to the driver of any vehicle which is disabled while on the paved or improved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position.

Article XV.

§ 103. When lighted lamps are required. When upon any highway in this State, during the period from sunset to sunrise, every motorcycle shall carry one lighted lamp and every motor vehicle two lighted lamps showing white lights, or lights of a yellow or amber tint, visible at least five hundred (500) feet in the direction toward which each motorcycle or motor vehicle is proceeding, and each motor

vehicle, trailer, or semi-trailer shall also exhibit at least one lighted lamp which shall be so situated as to throw a red light visible for at least five hundred (500) feet in the reverse direction.

§ 104. Clearance, identification, and side marker lamps. (a) Every motor vehicle of the second division as described in Article I of this Act, the length of which together with any trailer or trailers in tow thereof, is more than 25 feet and the width of which is more than 80 inches while being operated on the highways of this State outside the limits of cities, villages and incorporated towns, during the period from sunset to sunrise, shall display * * * on the rear thereon in a horizontal line approximately six inches apart, three red lights plainly visible at a distance of at least 500 feet.

§ 121. Vehicles of the second division to carry flares or similar devices. (a) No person shall operate any motor vehicle of the second division upon a highway outside of a business or residence district at any time from sunset to sunrise unless there shall be carried in such vehicle a sufficient number of flares, not less than three or electric lanterns or other signals capable of continuously producing three warning lights each visible from a distance of at least 500 feet for a period of at least 12 hours, except that a motor vehicle transporting flammable liquid may carry red reflectors having a minimum diameter of six inches in place of the other signals above mentioned.

(b) Whenever any motor vehicle of the second division and its lighting equipment are disabled during the period when lighted lamps must be displayed on vehicles and such motor vehicle cannot immediately be removed from the main traveled portion of a highway outside of a business or residence district, the driver or other person in charge of such vehicle shall cause such flares, lanterns, or other signals to be lighted and placed upon the highway, one at

a distance of approximately 100 feet in advance of such vehicle, one at a distance of approximately 100 feet to the rear of the vehicle, and the third upon the roadway side of the vehicle, except that if the vehicle is transporting flammables three red reflectors may be so placed in lieu of such other signals and no open burning flare shall be placed adjacent to any such last mentioned vehicle.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942

No. 119

ADVANCE TRANSPORTATION COMPANY, a corporation,

Petitioner,

vs.

ARTHUR F. MILLER, THOMAS G. FOSTER, RICHARD J. BROWNE, EDWARD J. SHOFFNER and ALBERT F. WAGNER,

Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Reply Brief

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The Facts.

On pages 23 to 33 of its petition and brief, the defendant pointed out some twelve or more instances in which the Circuit Court of Appeals, in its opinion, overlooked or misapprehended the controlling facts as shown by the plaintiffs' proof and wherein the court was in error in its statement of the facts. The plaintiffs have made no answer to this portion of the defendant's brief.

Although the plaintiffs accuse the defendant of not having stated all of the pertinent facts and of misstating some of the evidence, they have not, in their supplemental statement, pointed to any evidence in the record which even tends to support the misstatements made by the Circuit Court of Appeals. Nor have they even claimed the facts to be as stated by the court, except in one instance and that only by way of conclusion. At the

bottom of page 2 of their brief the plaintiffs state, with reference to the defendant's driver, Reid, that he "abandoned his truck and went across the highway with a lighted fusee in his hand and stood beside the mired truck on the west side of the highway helping to protect southbound traffic (R. 85)." But the testimony appearing on page 85 of the transcript, to which the Court is referred, or on any other page for that matter, does not support this conclusion. There is no evidence that Reid "abandoned" his truck, or that he was "helping protect southbound traffic." The plaintiffs' proof is that there was no southbound traffic to protect.

Nor have the plaintiffs pointed to any additional facts which justify the judgment of the court. Near the top of page 2 of their brief they state by way of conclusion with reference to the defendant's drivers stopping their trucks: "There was no necessity for stopping where they did." They point to the testimony of the driver of the Bartzen truck that another truck had pulled off onto this shoulder and then went on. But that was sometime before the defendant's trucks arrived. Furthermore, this testimony was not proof that the shoulder was sufficient to sustain the weight of the defendant's trucks, but merely that the driver of that truck was lucky in that his truck did not mire down. When the defendant's trucks arrived, the drivers were confronted with the obvious fact that the Bartzen truck had mired down into the shoulder and was unable to get back onto the pavement. They were, therefore, justified in concluding that the shoulders were soft and would not sustain the weight of their trucks, loaded as they were, and that it was not practical for them to pull their trucks off the pavement onto the shoulder.

Nor does the plaintiffs' evidence to the effect that after the accident a tow truck and certain automobiles

used this shoulder furnish any proof that it was sufficiently solid to sustain the weight of the defendant's trucks. On the contrary, if this evidence tends to prove anything, it proves that the plaintiffs had not only 30 or more feet of clear pavement to the left of the defendant's trucks on which to pass them, had the plaintiffs been at all observant, but, in addition thereto, two shoulders, 9½ feet in width according to the plaintiffs, which they might have made use of for that purpose. Plaintiffs' proof shows that traffic was not interfered with, that it was not practical for the defendant's trucks to drive onto the shoulder, and that there was no violation of the statute referred to.

In the second paragraph on page 3 of the plaintiffs' brief, they state: "At no time prior to the collision in question did any of the truck drivers of the defendant put out any flares or fusees near or around or behind any of the defendant's trucks." That, of course, is immaterial. Under the pleadings there was no duty on the part of the defendant to put out any flares or fusees unless the statute referred to in sub-paragraph 9 (h) of the plaintiffs' complaints was applicable. As is pointed out on pages 77 to 80 of the defendant's petition and brief, the statute alleged to have been violated could have no application since there was no proof that the defendant's trucks and their lighting equipment were disabled at the time of the occurrence. The plaintiffs' proof is that such was not the fact.

On page 4, in the last paragraph of their supplemental statement, the plaintiffs state with reference to the fusees: "These flares cast a red glow into the atmosphere and over the landscape, causing the red body of the truck to blend into the surroundings so as to make it undiscernible as one traveled toward it." It was so charged in sub-paragraph 9 (a) of the plaintiffs' com-

plaints, but, as pointed out on pages 68 to 70 of the defendant's petition and brief, was never proven. It is quite significant that the plaintiffs have not referred this Court to any place in the record for proof of this charge. Furthermore, the proof shows that the occurrence took place in the nighttime. Under such circumstances it would be the lights on the rear of the truck and not the truck itself that would be observable by a driver approaching from the rear. The plaintiffs proved that the lights on the truck were burning, but that they did not see them.

It is, therefore, respectfully submitted that the plaintiffs' supplemental statement of facts adds nothing material or pertinent to the facts as stated in the defendant's petition and brief; that the plaintiffs' conclusions are unsupported by any proof, and that they have failed to point to any evidence in the record which even tends to justify the misstatements of fact made by the Circuit Court of Appeals.

ARGUMENT.

I.

Whether or not the writ will be granted is within the sound judicial discretion of this Court.

Careful consideration was given to the provisions and requirements of both the statute and Rule 38 (5) of this Court, before the defendant's petition was filed. It is true, of course, that the writ of certiorari should be granted only where there are special and important reasons therefor. It is also true that the writ is not a matter of right, but of sound judicial discretion. But, it is respectfully submitted, that where, as here, the Circuit Court of Appeals has overlooked or misapprehended the controlling facts in some twelve or more particulars, none of which opposing counsel has even attempted to justify from the record or to demonstrate were not material to the Court's decision, sufficient special and important reasons exist for the granting of the writ. It is also respectfully submitted that where, as here, the errors in this regard were brought to the attention of the Circuit Court of Appeals (Tr. 529-553) and that court has refused to correct them (Tr. 555), such court has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, as is suggested by the rule in question.

Nor is counsel's assertion that "this is an ordinary negligence case," etc., a ground for denying the writ. A consideration of negligence cases is not excluded by the rule. This Court has considered them on many occasions. Furthermore, counsel's assertion that the case

"involves nothing except the usual ordinary issues of fact in negligence cases," etc., is merely an attempt to side-step the issues involved. The issues raised by the defendant's petition present not questions of fact, but questions of law: Whether the evidence is sufficient to sustain the verdict and whether the law as laid down in the opinion of the Circuit Court of Appeals is in conflict with the law of Illinois as laid down in its court decisions and statutory enactments. It is respectfully submitted that where, as here, the Circuit Court of Appeals has failed to follow the law of Illinois, the state in which the occurrence took place and in which the trial was had, such failure furnishes sufficient reasons, under the rule, for the issuance of the writ.

II.

The Circuit Court of Appeals failed to follow the law of Illinois.

Under Point II of the defendant's brief it is pointed out that it was the duty of both the District Court and the Circuit Court of Appeals to follow the law of Illinois in arriving at their decisions; that under the law of Illinois the burden is on the plaintiff to prove freedom from contributory negligence on his part, negligence on the part of the defendant, and that the negligence, if any, of the defendant was the proximate cause of the injury. It is further pointed out that under the law of Illinois, a plaintiff must produce positive, affirmative proof of actionable negligence and that damages cannot be assessed on surmise or conjecture as to what may or may not be the facts. We believe these propositions of law were correctly stated in cases cited and quoted from. Counsel for the plaintiffs has not disputed them. He has merely asserted that the Circuit Court of Appeals has followed the well-established law that the existence

of negligence, freedom from contributory negligence, and proximate cause are questions of fact for the jury. But such is not the law of Illinois. The existence of negligence, freedom from contributory negligence and proximate cause, under the law of Illinois, are never questions of fact for the jury unless and until the plaintiff has sustained the burden of producing some positive affirmative proof of each of them. If the plaintiff fails to produce any such proof as to any one of them, the defendant is entitled to a directed verdict. The same is true where the plaintiff's proof disproves any one of them. In the case at bar the plaintiffs not only failed to produce any proof of freedom from contributory negligence on their own parts, but, on the contrary. proved themselves to be guilty of contributory negligence. Not only is this true, but, as pointed out in defendant's brief (pp. 67-80), the plaintiffs failed to produce any evidence which tends to prove any of the charges of negligence laid in their complaints. Under these circumstances, it was the duty of the trial court to direct verdicts for the defendant and the Circuit Court of Appeals was in error in refusing to so hold.

Counsel states: "No motion for new trial was made and no error is alleged in the court's rulings on evidence or the giving or refusal of instructions." But that is, of course, immaterial. The defendant was not asking for a new trial, but for directed verdicts or judgments notwithstanding the verdicts. The plaintiffs failed to make out their cases and whether or not there were errors committed on the trial is of no importance. While there may have been some conflict in the decisions of the Federal Courts, before the Rules of Civil Procedure were promulgated, as to whether a defendant's remedy was limited to a new trial where the trial court was in error in refusing to direct a verdict, under the decisions of this Court, particularly since the promulgation of

these rules, as well as under the practice of Illinois, the defendant's remedy is not so limited and a motion for judgment notwithstanding the verdict is the proper procedure for the correction of such error.

Counsel further states that "defendant had failed to preserve in the printed record the instructions given or refused and the inference from such failure necessarily must be that the trial court followed the rule of *Erie R. Co.* v. *Tompkins*," etc. Such an inference could not, of course, either logically or legally follow. The error on the part of the trial court in refusing to direct verdicts for the defendant could not be cured by the instructions given to the jury, no matter how accurate or complete such instructions may have been. A motion to direct raises purely a question of law for the trial court and not a question of fact for the jury, and it is not the province of the jury to correct the error of the trial court in overruling such motion by bringing in the proper verdict under the instructions of the court. If the jury had brought in such verdicts, the plaintiffs, of course, could not complain, but since they did not, the defendant is not to be precluded by their verdicts from its remedy. Under the issues here, the instructions, given or refused, by the trial court are not a necessary or even a proper part of the record.

It is, therefore, respectfully submitted that counsel's assertion that the Circuit Court of Appeals followed the law as laid down by the courts of Illinois is not correct and that the arguments advanced in support thereof are unsound.

III.

The evidence is insufficient to support the verdicts.

1. The plaintiffs were guilty of negligence, as a matter of law, which contributed to cause their injuries.

On pages 23 to 33 of the defendant's petition and brief, Point I of the Argument, are pointed out some twelve or more instances in which the Circuit Court of Appeals overlooked or misapprehended the controlling facts as shown by the plaintiffs' proof and wherein the court misstated or misconstrued the evidence. In many of these, the statement made by the court is not only directly contrary to the plaintiffs' proof but most favorable to the plaintiffs' supposed causes of action. In others, positive, affirmative proof made by the plaintiffs, from which the only logical inference to be drawn is that they were guilty of contributory negligence, was wholly overlooked or ignored by the court, as, for example, the fact that the car in which they were riding skidded a distance of 75 feet, in a straight line, on a dry pavement, before it came into contact with the defendant's truck and at the time of the collision was still traveling, according to their own estimates, at a speed up to as high as 25 miles per hour.

It is quite significant that the plaintiffs have not, in their supplemental statement of facts, or elsewhere in their brief, claimed these facts to be as stated by the Circuit Court of Appeals. They have not even attempted an answer to Point I of the defendant's argument. They have not even suggested that these misstatements of the facts are immaterial or are not the controlling factors upon which the court based its decision. The plaintiffs' silence with respect to these misstatements is, we repectfully submit, a tacit admission that they cannot be justified from the record.

Nor has counsel for the plaintiffs pointed to any evidence in the record tending to prove any of the essential elements of their case. On the contrary, he has merely quoted from a few cases (Plaintiffs' Brief 9-12) wherein it is held that if there is evidence fairly tending to support a plaintiff's case, the case must be submitted to the jury; summarized in a somewhat perfunctory manner the charges laid in the complaints; and referred the court to paragraph 13 of the opinion of the Circuit Court of Appeals in which the question of the plaintiffs' contributory negligence was not even considered.

The cases cited by counsel have no application to the situation in the case at bar. It is, of course, the law that where the plaintiff has produced some evidence fairly tending to prove the essential elements of his case, even though the defendant produces evidence which is in conflict therewith, the case must be submitted to the jury. But whether or not the plaintiff produced any such evidence is a question of law for the court on a motion to direct. Under the law of Illinois, as is pointed out in defendant's brief, the plaintiffs must first of all sustain the burden of producing some evidence fairly tending to prove that before and at the time of the occurrence they were in the exercise of ordinary care for their own safety. And where, as here, the plaintiffs failed to sustain that burden, there was no question of fact to submit to the jury and verdicts should have been directed for the defendant. Had there been any such proof, counsel, by a simple analysis of the evidence, could have easily pointed it out. He has, however, made no attempt to do so. The plaintiffs not only failed to produce any such proof, but, on the contrary, the proof produced by them shows that they were guilty of contributory negligence as a matter of law.

Nor can the plaintiffs relieve themselves of the burden

of proving their freedom from contributory negligence by charging, in their complaints, that the defendant was negligent. The fact, as pointed out by counsel, that there were eight charges of negligence laid in the complaints does not change the situation. Even had they proved all of these charges,—they proved none of them (See petition and brief, pp. 67-80),—they would still not be entitled to have the cases submitted to the jury since they failed to produce any proof of their own freedom from contributory negligence.

Nor does what the Circuit Court of Appeals said in paragraph 13 of its opinion, to which this Court is referred, change the situation. As is pointed out above, the court did not even consider the question of the plaintiffs' freedom from contributory negligence in this paragraph of its opinion. It is devoted wholly to a consideration of whether or not the plaintiffs proved any of the charges of negligence laid in their complaints. It will be noted also from this paragraph of the court's opinion and from the opinion as a whole, overstated as the facts are in favor of the plaintiffs, that the court was unable to point to any evidence tending to prove any of the charges laid in the plaintiffs' complaints and that the court was laboring wholly in the field of surmise or conjecture as to which, if any, of the charges the evidence tended to sustain. Had there been any evidence to support any of the essential elements of the plaintiffs' cases, the court would have had no difficulty in pointing it out. The court was able to point to none. Its conclusions are based wholly on speculation and conjecture as to what was the cause of the occurrence complained of and not on proven facts. Where the proof is in such a state, under the law of Illinois, the verdicts for the plaintiffs cannot stand.

The controling facts in the case at bar do not differ from those in the case of *Cooney* v. *F. Landon Cartage*

Co., 308 Ill. App. 444, considered in the defendant's petition and brief, beginning on page 37. Counsel for the plaintiffs disputes this (Br. 13), but, we submit, his attempt to distinguish them is without merit, and in several respects he has misstated them. In the *Cooney* case the court held that the plaintiff could not recover on the ground that the deceased was guilty of contributory negligence. Counsel states that it was proven in that case, and not here, that the lights on the truck were visible approximately 500 feet away. If the lights on the defendant's truck in the case at bar were not visible for that distance, as required by statute, the burden was on the plaintiffs to prove such to be the case. They made no such proof. Counsel states there was nothing to impair visibility. That was true in the case at bar. Both accidents happened in the nighttime. The plaintiffs' proof in the case at bar is that the weather was clear and that the pavement was dry (Tr. 92, 104, 225, 248), and that there was nothing to interfere with their visibility. If counsel is merely referring to the supposed smoke or fog at the place of the accident, that, too, was visible to the plaintiffs, as well as the lights from the fusees, according to their testimony, quite some distance before they approached the place of the occurrence. The plaintiffs in the case at bar were not in as good a position to claim they were in the exercise of ordinary care as the deceased in the *Cooney* case, since they were forewarned by these lights and this supposed smoke or fog that something was wrong ahead. Counsel states that the defendant's driver in the *Cooney* case was forced to leave his truck standing, having run out of gas. But the reason for stopping the truck could have no bearing whatever on the question of the plaintiffs' contributory negligence. Counsel states that in the *Cooney* case the plaintiff's car at the time of the collision was traveling some 45 to 70 miles per hour, at the

time of the collision. A reading of the opinion in that case does not bear this out. The proof is that it had been traveling at that speed, but that was before it skidded the distance of 100 feet. The plaintiffs in the case at bar conceded they were traveling about 45 miles per hour (the defendant's proof showed it to be much higher (Tr. 360)) as they approached the place of the occurrence, and that they skidded a distance of 75 feet before colliding with the defendant's truck. It might also be noted here that the car in the *Cooney* case skidded on a frozen pavement, while the car in the case at bar skidded the distance of 75 feet on a dry pavement. Apparently there could have been no material difference in the speed at which the cars were being driven in the two cases.

Near the bottom of page 13 of the plaintiffs' brief counsel states that the plaintiffs were traveling at a speed of 15 to 20 miles per hour. This, we respectfully submit, is a misstatement of the fact. Counsel has not referred the court to the record for any testimony supporting this statement. The plaintiffs' proof is that it was traveling at that or a greater rate of speed at the time of the impact, after skidding this distance of 75 feet (Tr. 144, 149, 169, 234).

There can be no question that if the plaintiff's deceased in the *Cooney* case was guilty of contributory negligence barring a recovery, the plaintiffs in the case at bar were equally guilty. But the *Cooney* case is not the only Illinois case on facts similar to those in the case at bar. It follows a long line of Illinois cases to the same effect, some of which are cited and quoted from in the defendant's petition and brief (pp. 39-46). The decision of the Circuit Court of Appeals in the case at bar is not only in conflict with, but directly contrary to, the established law of Illinois as laid down in these cases.

Furthermore, the court, by its decision has, contrary to the established law of Illinois, sanctioned the practice of submitting the case to the jury on proof of the plaintiffs' contributory negligence. The opinion of the court is not, however, very clear on its reasons for so doing. It may be that the court had in mind the doctrine of comparative negligence which prevails in some states of this circuit, such as the state of Wisconsin. But the doctrine of comparative negligence does not prevail in Illinois. *West Chicago St. Ry. Co.* v. *Linderman,* 187 Ill. 463 at 468; *Chapin* v. *Foege,* 296 Ill. App. 96 at 100.

The case of *Skamenca* v. *Reeser,* 294 Ill. App. 216, relied upon by the plaintiffs, has little, if anything, in common with the case at bar, either on the facts or on the pleadings. In that case the plaintiff and defendant were approaching each other from opposite directions on a two-lane highway. The occurrence took place in the nighttime and it was damp and foggy. Visibility was very poor. There was a conflict in the evidence with regard to the side of the highway on which the cars were traveling at the time of the collision. The trial court granted a new trial on the ground that erroneous instructions were given at the request of the defendant. The appeal was from this order. The court held that under the evidence the instructions were erroneous and affirmed the order granting a new trial. The difference between that case and the case at bar is obvious. In that case the fog was a continuing condition through which both the plaintiff and the defendant were forced to travel on a narrow highway. In the case at bar the supposed smoke or fog was local and according to the plaintiffs' own testimony was observed by them when they were some 200 feet distant from it. Their proof shows that although they were aware of its presence, without decelerating their speed to any considerable extent, they plowed into it at such a speed that after

skidding a distance of 75 feet on a dry pavement they were still traveling at a speed as much as perhaps 25 miles per hour at the time of the collision. The holding in the *Skamenca* case furnishes no support for their contention that they were not guilty of contributory negligence.

In the case of *Mapes* v. *Hulcher,* 363 Ill. 227, also relied upon by the plaintiffs, the facts bear little, if any, resemblance to those in the case at bar. In that case the accident happened in the nighttime, it was snowing, and visibility was limited and difficult. The defendant's truck had stopped at the bottom of a hill or incline. The highway was a two-lane highway. The defendant's truck was disabled and the evidence was conflicting as to whether there were any lights on its rear. The driver of the car in which the plaintiff was riding was driving with his head out of the window, watching the road as best he could under difficult circumstances. The windshield was more or less covered with snow, but the plaintiff's proof showed that she was doing her best to watch the road by looking through a small clear space at the bottom of the windshield. This case, we submit, furnishes no authority for the plaintiffs' contention that under the proof they adduced, they were in the exercise of ordinary care at the time of the occurrence complained of.

2. If the plaintiffs were unable to see clearly ahead, it was negligence on their part to drive with dim lights only, particularly when the bright lights were available.

According to the testimony of the plaintiffs, none of them saw the defendant's truck until just shortly before the car in which they were riding collided with it. As an excuse for this failure, it was contended on the trial that their vision was obscured by the supposed smoke or fog created by the burning fusees. They were in

wide disagreement as to the extent their vision was obscured, but in agreement that it was obscured. They were in agreement also that the car in which they were riding was being driven with the dimmer lights. They produced no evidence whatever as to what extent the highway was lighted up, or objects ahead could be discerned by the use of these lights. On cross-examination, Miller, the driver, and Foster, who was seated in front with him, would not even venture an estimate of how far these lights lighted up the pavement ahead. They testified that the car was equipped with bright lights, but that they were never turned on.

Counsel for the plaintiffs has not attempted to justify the failure of the plaintiffs to make use of the brighter lights. He has merely referred the court to two cases in which the Appellate Court of Illinois has held that, under the circumstances and local conditions shown by the evidence in these cases, the question of whether or not the driving of the cars with the dimmer lights was the proximate cause of the occurrence was properly submitted to the jury. But the facts in those cases bear little, if any, analogy at all to the fact in the case at bar. In the case at bar the plaintiffs, according to their testimony, were aware of this supposed smoke or fog when they were quite some distance away from it. They knew, according to their testimony, it would obscure their vision when they entered it. They drove through some 200 feet of it during which their vision was obscured. They must have known from the presence of the fusees and this supposed smoke or fog that something was wrong at this place on the highway. Common prudence would have dictated that if they were unable to see with these dimmer lights they should have made use of the brighter lights in order to determine what was ahead of them. They offered no proof that the use of the brighter lights would have been of no avail or any excuse for their failure to make use of them.

3. If the "smoke," "fumes," "fog," or "smudge," from the flares did, in fact, obscure the vision of the plaintiffs, they were negligent in failing to slow down to such speed as would enable them to stop within the range of their vision.

Counsel's answer to this point is merely that "the plaintiffs were entitled to assume that the highway ahead of them was not unlawfully obstructed." Such, of course, is not the law and particularly under the circumstances shown by the plaintiffs' proof. Nor is it a correct statement of the law even if it were conceded, which it is not, that the defendant was unlawfully obstructing the highway. The law in this respect is lucidly pointed out by the Supreme Court in the case of *Schlauder* v. *Chicago & Southern Trac. Co.*, 253 Ill. 154, where the court say at page 159:

> "There is a presumption of law that every person will perform the duty enjoined by law or imposed by contract, and anticipation of negligence in others is not a duty which the law imposes. (Citing cases) While that statement has often been made and the presumption is to have due weight in determining questions of negligence, it is manifest that the presumption is not a conclusive one and that no one has a right to rely solely upon it in regulating his own conduct. The presumption does not absolve one from exercising such care and prudence as a reasonably prudent person would under the same circumstances, nor relieve a carrier of passengers from the duty of exercising that degree of care demanded by the law in view of the circumstances and surroundings. One who has an unobstructed view of an approaching train would not be justified in closing his eyes and crossing a railroad track in reliance upon the presumption that a bell would be rung or a whistle sounded. *No one can assume that there will not be violations of the law or negligence of others and offer the presumption as an excuse of failure to exercise care.*" (Italics ours.)

Under the law as laid down in this case, the plaintiffs cannot excuse their negligence by merely contending that the defendant was negligent.

Nor is there any law in Illinois requiring the driver of a motor vehicle upon the highway to keep out of the way of a vehicle approaching from his rear. As was said in the case of *Hogrefe* v. *Johnson,* 271 Ill. App. 469, cited and quoted from in defendant's brief, at page 473:

> "The rights of persons operating automobiles upon public highways are equal and their duties towards one another are reciprocal; and persons operating automobiles upon the public highways, if in the exercise of ordinary care, should be on the alert for other cars upon the highway. Persons operating automobiles are chargeable with notice that others are to be expected to be using such highway, and they owe a mutual duty to each other to exercise reasonable care to avoid collision."

Furthermore, the reason for four-lane highways, such as the one in question, is that vehicles do not travel at the same rate of speed upon the highway, and the additional lane enables those approaching from the rear to pass the slower moving vehicles. The plaintiffs must be charged with the knowledge of the law of the road that the slower moving vehicles should keep to the outer lane. Yet with this knowledge, with the knowledge that there was something wrong at this point on the highway, with their vision obscured by the supposed smoke or fog, and without decreasing their speed to any considerable extent, they proceeded through this supposed smoke or fog on this outer lane, where slow moving vehicles could be expected to be, at a rate of speed so great that they were unable to stop after skidding a distance of 75 feet. It is not the law, as counsel assert, that the plaintiffs had a right to assume that the highway ahead of them was unobstructed, whether lawfully or unlawfully, "and

their actions after entering the area of smoke and glare" were not those of reasonably prudent men, as counsel contends.

The facts in the cases cited and quoted from by counsel for the plaintiffs in support of this proposition bear little, if any, resemblance to those in the case at bar. In the case of *Sidle* v. *Baker,* 52 Ohio App. 89, the accident happened at night. Snow and sleet were falling, obscuring the vision. The paved portion of the highway was only 16 or 18 feet wide. After driving over the brow of a hill, the defendant stopped, with the left front of his car over the center line of the pavement, for the purpose of cleaning the ice from his windshield. A second car came over the brow of the hill and, observing a car approaching from the opposite direction, attempted to stop, but was forced to run off onto the shoulder and stopped parallel with the defendant's car. About that time the plaintiff came over the brow of the hill and, observing the oncoming car, attempted to stop without colliding with the other cars, as a result of which he overturned in the ditch. In that case the defendant's stopping just over the brow of the hill created a sort of trap for the plaintiff and the other car which was following him. The plaintiff had no reason to suspect any danger until he arrived at the top of the hill and found the distance between him and the cars ahead too short for him to come to a stop. In the case at bar the highway was straight and level and there was no hill to interfere with the plaintiffs' view. The plaintiffs had many visible signs of danger, had they looked. There were the lights burning on the defendant's trucks. There was a string of fusees and torches stretched along the road. There was a string of trucks parked along the highway for a distance of some 200 feet. There was the supposedly dense smoke or fog, cutting off their vision. There were many things to warn them that they

must proceed with caution and had they done so there would have been no collision.

In the case of *Body Fender & Brake Corp.* v. *Matter*, 172 Va. 26, quoted from by counsel, defendant's tow truck was being used to pull a large, heavy truck, which had run off the highway into the sand, back onto the pavement. Here the highway was also a two-lane highway. The tow truck was standing diagonally across the plaintiff's traffic lane in such a manner that the lights were not visible to the plaintiff. There were a number of cars approaching from the opposite direction, some of which had dimmed their lights and others that had not. The plaintiff had dimmed his lights for the benefit of this traffic. Failing to see the defendant's tow truck, he collided with it. The defense was that the defendant's helper was attempting to warn traffic with a flash light. The evidence concerning this, however, was in conflict. The facts in that case bear no analogy to those in the case at bar. One of the causes of the collision in that case was the lack of room in which to pass the tow truck because of the oncoming traffic. In the case at bar there was no oncoming traffic and the plaintiffs had three clear traffic lanes in which they could have passed the defendant's truck, had they only looked.

In the case of *Moyer* v. *Vaughan's Seed Store*, 242 Ill. App. 308, the defendant's truck was stalled on one of the traffic lanes of a two-lane highway. There was some conflict as to whether it had any lights burning on its rear, but it appears from the evidence that it did not. The plaintiff, who was traveling in the same direction as this truck, dimmed his lights for a truck approaching from the opposite direction. As he switched on the brighter lights he discovered the truck ahead of him, but too close for him to stop without colliding with it.

It will be noted that in each of these cases relied upon by the plaintiffs the occurrence took place on a two-lane

highway; the defendant's vehicle was unlawfully parked, or without lights; there was traffic approaching from the opposite direction; and the plaintiff was caught in a trap which he could not avoid. In the case at bar none of these circumstances were present and the occurrence would have been avoided if the plaintiffs had exercised only the slightest amount of care.

4. Where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it.

When the defendant's petition and brief was prepared it was assumed that it would be contended, as it was below, that even if the court found that the plaintiff, Miller, the driver of the car in question, failed to prove the exercise of ordinary care on his part, or was guilty of contributory negligence as a matter of law, the court might find differently as to the other plaintiffs, or some of them, since they were merely passengers in the car driven by the plaintiff, Miller. This contention of the plaintiffs was based on the well established principle of law in Illinois that the negligence of the driver of a car is not imputable to a passenger therein unless such driver is the agent of such passenger, and that it is only his own negligence or his failure to exercise ordinary care, that can be considered in an action brought by such passenger.

But as is pointed out in defendant's petition and brief (pp. 55 to 58), it is an equally well established principle of law in Illinois that where a passenger in a vehicle has an opportunity to learn of danger, he has no right, because someone else is driving, to omit efforts on his part to avoid it. As is also pointed out in this section of the defendant's brief, the other plaintiffs, particularly the plaintiff Foster, who was seated in the front seat, had as good an opportunity as did the plaintiff,

Miller, to observe the situation and to learn of the approaching danger and to take steps to avoid it; that they failed in this regard; and that they, as well as the plaintiff, Miller, were guilty of contributory negligence as a matter of law.

Since counsel for the plaintiffs has not contended here that any of the passenger plaintiffs is in a more favorable position or is entitled to any more favorable consideration than is the plaintiff, Miller, and has made no answer to this part of the defendant's argument, it must be assumed that he concedes that if the plaintiffs' proof failed to show that the plaintiff, Miller, was in the exercise of ordinary care for his safety or was not guilty of contributory negligence, the same is true with respect to the passenger plaintiffs.

5. The fact that the truck was standing on the highway was merely a condition by which the injury was made possible and not the proximate cause of the injury.

Counsel's main contention here seems to be that the defendant violated Section 88 of the Uniform Act Regulating Traffic on Highways. The essential part of this statute is set out on page 76 of the defendant's petition and brief and also on page 29 of the plaintiffs' brief. It will be noted that this statute is merely a traffic regulation applying only to highways outside of a business, residence or suburban district. It has no application to a highway within the corporate limits of a city, village or incorporated town. It will also be noted that the statute does not purport to absolutely forbid stopping a vehicle "upon the paved or improved or main traveled part" of the highway, but only when it is practical to stop, park, or leave it off such part of the highway. It will also be noted that this statute provides that in case a vehicle is stopped on the highway it is required to leave a clear and unobstructed width of at least 20 feet op-

posite such vehicle for the free passage of other vehicles, etc. It will also be noted that this statute does not create a cause of action on behalf of any person who may collide with such vehicle when stopped. It is respectfully submitted that under the plaintiffs' proof the defendant did not violate this statute. The proof shows that a truck, similar in size and weight, had mired down into the shoulder on the opposite side of the highway to such an extent that it was unable to get back onto the pavement. From this fact alone it is not only reasonable and logical to conclude, and for the defendant's drivers to so conclude, that it was not "practical" for trucks such as the defendant's, to stop off the pavement. Plaintiffs' proof also shows that there was a "clear and unobstructed width" of not only at least 20 feet, as required by the statute, but more than 30 feet left for the free passage of other vehicles. The defendant's drivers fully complied with the requirements of this statute.

But assuming, which we do not concede, that there was a technical violation of the statute on the part of the defendant's drivers, still, under the law of Illinois, such violation would only be *prima facie* proof of negligence and the plaintiff would still be required to prove that such violation was the proximate cause of the occurrence complained of. Counsel for the plaintiffs has pointed to no such proof. He has merely cited and quoted from a few cases in which, under the facts peculiar to those cases, the evidence tended to prove that the stopping of the vehicle was the proximate cause of the occurrence.

But the facts in these cases are not analogous at all to the facts in the case at bar. The single fact that in each of the cases cited by counsel for the plaintiffs the occurrence took place on a two-lane pavement instead of a four-lane pavement distinguishes them from the case at bar. The purpose of the statute being to ex-

pedite traffic on the highway, it is obvious that there are many things which a driver must do in order to comply with it when traveling upon a two-lane highway which would not be required when traveling upon a four-lane highway. For example, the driver upon a two-lane highway could not stop upon the pavement and at the same time leave a width of 20 feet for the passage of other vehicles. If it were not practical for him to pull off the pavement at a given place, it would necessitate his continuing on to a place where he could do so before stopping, a requirement which would not be necessary at all on a four-lane highway. It may be possible to conceive of traffic conditions on a four-lane highway being such that a driver, in order to comply with the requirements of this statute, might be required to continue on to a place where it is practical to drive off the pavement before stopping, but the plaintiffs' proof in the case at bar fails entirely to show any such condition. Their proof is conclusive that there was at least three clear traffic lanes in which they could have passed the defendant's truck, had they been at all observant, and that there was no traffic approaching from the opposite direction.

Thus, in the case of *Rhoden* v. *Peoria Creamery Co.*, 278 Ill. App. 452, relied upon by counsel for the plaintiffs, the defendant's truck was traveling on a two-lane highway, and due to a broken pin in the timer was stopped upon one of the traffic lanes. A second truck following came to a stop or nearly to a stop behind the defendant's truck. The driver of the car in which the plaintiff was riding and which was following the trucks attempted to turn into the other lane to pass the trucks, but was blocked by a car coming from the opposite direction. In attempting to swerve back into its own traffic lane it collided with the second truck. The facts are so obviously different from those in the case at bar as to require no comment.

The case of *Emrick* v. *Phillips,* 134 Pa. Sup. 45, also relied upon by counsel for the plaintiffs, involves only a two-lane highway. In that case the defendant brought his tractor and trailer to a stop on the pavement, but in doing so he not only blocked his own traffic lane, but the buckling of the tractor and trailer forced the front end of the trailer over the center line of the pavement so that it obstructed the other traffic lane to some extent. The plaintiff in attempting to pass the truck on the other lane was blinded by the lights of an oncoming car and collided with that part of the trailer protruding into that lane. The facts in that case bear no analogy to the facts in the case at bar.

With regard to the cases of *Fitzpatrick* v. *California & Hawaiian Sugar Ref. Corp.,* 309 Ill. App. 215; *Bos* v. *Richards,* 71 Fed. (2d) 262; *Moyer* v. *Vaughan's Seed Stores,* 242 Ill. App. 308; *Mapes* v. *Hulcher,* 363 Ill. 227, enough has already been said to distinguish them from the case at bar. Suffice it to say here that in each of them the occurrence took place on a two-lane highway and not on a four-lane highway as in the case at bar and that the facts are so different that the rules of law governing the decisions in those cases could have no application to the facts in the case at bar.

This is not a case where it is contended that the collision was caused by the stopping of the defendant's trucks. Counsel for the plaintiffs insists that the trucks had come to a stop some 3 or 4 minutes before the collision occurred (Br. 3). The plaintiffs' complaint is that they were injured because of the presence of the trucks on the highway and not as a proximate result of their stopping. But as is pointed out in defendant's petition and brief, pages 59-65, the presence of the defendant's trucks on the highway merely furnished a condition by which the collision was made possible and was not the

proximate cause of the occurrence. The proximate cause of the occurrence was the negligence of the plaintiffs in failing to observe the presence of the trucks in question in ample time to avoid the collision and in failing to have their car under sufficient control to pass them after they had observed their presence. The plaintiffs' proof that the car in which they were riding skidded a distance of 75 feet before it collided with the defendant's truck shows that the driver had ample space in which to avoid it had he been driving at a reasonable rate of speed, and that whether the truck was standing or moving was not a controlling factor as to the cause of the collision. It was not the presence of the defendant's trucks on the highway that was the proximate cause of the collision, but, on the contrary, the negligence of the plaintiffs.

IV.

The plaintiffs failed to produce any evidence which tends to prove any of the charges laid in their complaints.

Under Point IV of the defendant's argument (Pet. & Br. 67-80) it is pointed out that eight separate charges of negligence are set up in the plaintiffs' complaints. It is also pointed out that each of these is a charge of specific negligence. Counsel for the plaintiffs concedes that these charges are specific (Br. 11). It is not contended in the plaintiffs' brief that any of these charges are charges of general negligence, as stated by the Circuit Court of Appeals in the thirteenth paragraph of its opinion. It must, therefore, be taken as conceded that the Circuit Court of Appeals was in error in this statement.

Under the law of Illinois, before the plaintiffs were entitled to recover, it was incumbent upon them to prove one or more of these specific charges of negligence. If

they failed in this they are not entitled to recover, no matter what their proof may show.

Each of these charges is set up in full in the defendant's brief and considered seperately. As is pointed out, the plaintiffs failed to produce any evidence tending to prove any of these charges and, on the contrary, produced evidence which disproved most of them. Counsel for the plaintiffs has made no answer to this section of the defendant's brief. He has merely contented himself by asserting that the defendant was negligent, without attempting to point out wherein the defendant was negligent or to point to any evidence tending to prove any of the charges laid in these complaints. It does not appear from the plaintiffs' brief which, if any, of the charges it is contended has been proved. In fact, the applicability of the evidence to the charges laid in the plaintiffs' complaints has been practically, if not wholly, ignored.

V.

The Circuit Court of Appeals was in error in holding that there was no variance between the allegations of the plaintiffs' complaints and their proof.

Counsel's argument that there was no variance is merely an attempt to evade the truth by a rule of pleading which, under the plaintiffs' proof, could have no application. It is, of course, a familiar rule of pleading, that allegations of facts in a complaint which are not denied in the answer are assumed to be admitted for the purposes of the trial and need not be proven. But this rule does not cover the situation in the case at bar. The plaintiffs alleged that the accident happened at a certain point on the highway and outside the corporate limits of any city, village or incorporated town. This

allegation was not specifically denied by the defendant. Under this rule of pleading, the plaintiffs need not have proven these allegations. The plaintiffs, however, did not leave the place of the occurrence unproven, but, on the contrary, produced proof which showed conclusively that these allegations in their complaints were untrue; that the accident did not happen at the place where it was alleged to have happened, but at a place a mile or so farther north on the highway and at a point which the map introduced in evidence showed was within the corporate limits of the Village of Glencoe. It is true that the trial court ruled that all designations as to what was not incorporated territory should be stricken from the map and instructed the jury to disregard them, but this was on the erroneous theory that the pleadings were to control and not the plaintiffs' proof. The map, however, remained in evidence, and this action of the court could not cure the variance. The plaintiffs had alleged that the occurrence took place at a certain point on the highway and their proof showed that such was not the fact; that it happened at an entirely different place. It is quite significant here that counsel has not urged that the trial court instructed the jury to disregard any reference on the map to the Village of Glencoe for the reason that the court considered the map unreliable as stated by the Circuit Court of Appeals in the tenth paragraph of its opinion. It must be conceded, as the record shows, that the action of the trial court was based solely on the erroneous theory that the pleadings and not the proof were controlling.

A motion to direct on the grounds of variance is somewhat different from a motion to direct on the grounds of the insufficiency of the proof, since it must be made in the course of the trial, in order to give the plaintiff an opportunity to amend.

The law is well settled in Illinois, as pointed out on pages 83 and 84 of the defendant's brief, that where the variance is pointed out on the trial, and the plaintiff refuses to amend his pleadings to conform to his proof, a motion to direct should be sustained.

In closing his argument, counsel states that even if a variance could be considered to exist, there were eight specifications of negligence, at least five of which pertained to both incorporated and unincorporated areas and any one of which is sufficient to sustain the verdicts. Counsel's statement, however, is not in accord with the law. The rule that one good count is sufficient to sustain a verdict is applicable only when all of the counts state a cause of action, where there is evidence to support the good count, and no motion made for directed verdicts as to the other counts. The rule in this regard is very lucidly stated in *Robbins* v. *Illinois Power & Light Corp.*, 255 Ill. App. 106, where the court, after reviewing a large number of authorities, say at page 124:

> "In all of these cases, including *Grinestaff* v. *New York Central R. Co., supra,* where there are counts in the declaration of an independent nature, varying in the form of liability, a request for a peremptory instruction to direct a verdict for the defendant presents a question of law as to there being any evidence in the record in support of the verdict, and the doctrine that a verdict may be supported by one good count does not apply, especially in those cases where an issue is submitted to the jury that is without evidence to support it."

In the case at bar the defendant not only called the court's attention to the variance, but moved the court for leave to file an amendment to the answer setting up the facts as to the place of the occurrence as shown by the plaintiffs' proof (Tr. 372); moved the court to direct

verdicts for the defendant on the ground of the variance (Tr. 460); and moved the court separately to find the defendant not guilty as to each of the several charges laid in the plaintiffs' complaints (Tr. 473-480). But the trial court overruled each of these motions. Counsel for the plaintiffs, however, not only resisted each of these motions, but failed and refused to amend the complaints to speak the truth as shown by the plaintiffs' own proof.

It is, therefore, respectfully submitted that counsel's contention that the variance is neither material nor fatal is not well taken. If it is immaterial here, it becomes so only for the reason, as pointed out above, that the plaintiffs failed to produce any evidence tending to prove any of the charges laid in their complaints.

CONCLUSION.

In conclusion, your petitioner respectfully submits that the plaintiffs have not justified the errors of the Circuit Court of Appeals pointed out in its petition and brief; that the Circuit Court of Appeals has overlooked or misapprehended the controlling facts as shown by the plaintiffs' own proof; that in its refusal to correct its misstatement of the facts it has departed from the accepted and usual course of judicial proceedings so far as to call for an exercise of this Court's power of supervision; and that it has decided important questions of local law in conflict with local statutes and the applicable local decisions, as is suggested as grounds for the writ by Rule 38 (5) of this Court.

Your petitioner, therefore, prays that this Honorable Court may grant its petition for writ of ceritiorari in the said cause to the end that the said cause may be reviewed

and determined by this Court and the errors committed by the Circuit Court of Appeals and by the trial court may be corrected.

Respectfully submitted,

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